

*The*

# ANTITRUST BULLETIN

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## **ANTITRUST BULLETIN**

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## **ANNUAL REVIEW OF RECENT ANTITRUST DEVELOPMENTS**

by

**MILTON HANDLER\***

June 6, 1957

### **I.**

Last year I had occasion to call attention to the unsettling effect of three decisions involving the legality under the Sherman Act of exclusive selling agreements or distributorships.<sup>1</sup> In one, the Tenth Circuit had reversed a lower court ruling that such an arrangement was unlawful *per se* and had remanded the case for a new trial with a direction that the reasonableness of the restraint be submitted to the jury as an issue of fact.<sup>2</sup> In the second case, Judge Holtzoff had declined to upset a verdict of illegality after having left it to the jury to determine whether the restriction was reasonable.<sup>3</sup> Neither of these courts gave any specific content to the rule of reason to assist the jury in reaching its determination, permitting it to indulge its own notions of reasonableness. In direct conflict with these rulings, Judge Thomsen had upheld the validity of an exclusive distributorship as a matter of law by dismissing a treble damage complaint before trial for legal insufficiency.<sup>4</sup>

At the time, I pointed out that Judge Thomsen's decision alone was faithful to traditional Sherman Act doctrine sanctioning an agreement by a single seller to deal exclusively with one buyer "where the

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Author's Note: Grateful acknowledgment is hereby made to the valuable assistance I received in the preparation of this talk from my colleagues Stanley D. Robinson, Joel C. Coleman, Joshua F. Greenberg and Frances Bernstein.

<sup>1</sup> Handler, *Annual Antitrust Review*, 11 THE RECORD 367, 368 (1956).

<sup>2</sup> *Paramount Film Distributing Corp. v. Village Theatre, Inc.*, 228 F. 2d 721 (10th Cir. 1955).

<sup>3</sup> *Webster Motor Car Co. v. Packard Motor Car Co.*, 135 F. Supp. 4 (D. D. C. 1955).

<sup>4</sup> *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md. 1956).

exclusive is not part and parcel of a scheme to monopolize and effective competition exists at both the seller and buyer levels.”<sup>5</sup>

Naturally, I awaited with great professional interest the outcome of the appeals from the conflicting rulings of the two district judges. And I must confess that my interest did not abate when the attorneys for the plaintiff in Judge Holtzoff's case filed a six page document with the Court of Appeals for the District of Columbia entitled: “Memorandum in Answer to Professor Handler's ‘Annual Antitrust Review.’” The essence of their position was that—and I quote—“Professor Handler's gross misapprehensions of the nature of the present jury trial and of Judge Holtzoff's very narrow ground for decision on a motion n.o.v. make the Professor's views worth absolutely nothing.”<sup>6</sup> When I read these words, I knew that my closely guarded secret was out.

I believe that you will be interested in the aftermath of the three decisions.

The Fourth Circuit affirmed Judge Thomsen in *Schwing*,<sup>7</sup> adopting his opinion and embracing his lucid analysis.

The District of Columbia Court of Appeals, by a divided court, reversed Judge Holtzoff in *Packard*.<sup>8</sup>

Following the reversal of *Village Theatre*<sup>9</sup> by the Tenth Circuit, there have been two retrials, both resulting in jury disagreements. The next re-run of this marathon is now scheduled for the Fall.

The legal issues raised by the creation of an exclusive dealership are well illustrated by *Packard*. The plaintiff in that case was eliminated as a Packard dealer in Baltimore when a competitor received an exclusive franchise from the manufacturer. Judge Holtzoff sustained a recovery on two theories: (1) that an agreement between the manufacturer and its exclusive distributor was the equivalent of a conspiracy to monopolize trade in Packard cars; and (2) that such an agreement, as distinguished from a unilateral selection of a single distributor by Packard acting independently, constituted an illicit

<sup>5</sup> Handler, *supra* note 1, at 370.

<sup>6</sup> Memorandum for Appellee, p. 6, *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F. 2d 418 (D. C. Cir. 1957).

<sup>7</sup> *Schwing Motor Co. v. Hudson Sales Corp.*, 239 F. 2d 176 (4th Cir. 1956).

<sup>8</sup> *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F. 2d 418 (D. C. Cir. 1957).

<sup>9</sup> *Paramount Film Distributing Corp. v. Village Theatre, Inc.*, 228 F. 2d 721 (10th Cir. 1955).

conspiracy in restraint of trade. The majority of the Court of Appeals, consisting of Judges Edgerton and Prettyman, rejected both of these theories. In so doing they noted their substantial agreement with the reasoning in *Schwing*.

Applying the *Cellophane* doctrine,<sup>10</sup> the court held that "since there are other cars 'reasonably interchangeable by consumers for the same purposes' as Packard cars and therefore in competition with Packards, an exclusive contract for marketing Packards does not create a monopoly."<sup>11</sup> Hence the exclusive was not invalid under the monopoly exception to the general rule of legality. The court went on to repudiate the notion that the exclusive constituted an unlawful contract or conspiracy in restraint of trade. The fact that it was the exclusive distributor who requested the grant of exclusivity did not convert an otherwise lawful ancillary contract into an illegal vertical conspiracy. Nor did illegality ensue from the elimination of the other Packard dealers in the Baltimore area as an inevitable concomitant of the exclusive. The test is whether there is effective competition in the distribution of other makes of automobiles.

Expressing no opinion on the monopoly claim, Judge Bazelon dissented on the theory that the case had properly been submitted to the jury on the issue of conspiracy under Section 1 of the Sherman Act. According to the dissent, the jury was warranted in finding that the elimination of the plaintiff as a Packard dealer resulted not from Packard's unilateral decision in selecting its customers, but rather from an agreement between Packard and the exclusive distributor to get rid of the latter's competition.<sup>12</sup> At the same time, Judge Bazelon left open the question of whether the statute "applies to a manufacturer who, after a discussion with one dealer, decides to make the latter his exclusive distributor, cutting off all others, for the purpose of improving the manufacturer's competitive position vis-a-vis more powerful manufacturers."<sup>13</sup> But if the discussion rises to the level of an agreement to eliminate all dealers save the exclusive distributor—the necessary upshot of an exclusive—the dissent would hold the Act

<sup>10</sup> *U. S. v. E. I. duPont de Nemours & Co.*, 351 U. S. 377 (1956).

<sup>11</sup> *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F. 2d at 420.

<sup>12</sup> Under this view of the law, the Sherman Act "does not interfere with the manufacturer's right to select his dealers but it does prevent him from combining and conspiring with one not to deal with another." *Id.* at 422.

<sup>13</sup> *Id.* at 421, n. 1.

transgressed. But as the majority pointedly observed: "Since the immediate object of an exclusive dealership is to protect the dealer from competition in the manufacturer's product, it is likely to be the dealer who asks for it." <sup>14</sup> Hence any distinction between discussion and agreement is completely unrealistic.

Although the atmosphere has been appreciably cleared as a result of the concurrence of two circuits on this subject, we are still confronted with a measure of uncertainty stemming from the fact that the Tenth Circuit has declared that the reasonableness of an exclusive distributorship is an issue to be submitted to the jury. As I have stated before, I can see nothing to recommend a rule which permits the legality of this traditional ancillary restraint to depend on the fluctuating and untrammeled judgments of different juries. If there is a genuine issue of fact as to the anticompetitive effects of an exclusive—that is, if there is a real dispute as to whether competing buyers are being denied access to needed supplies—there is room for a jury to perform its normal fact-finding function. Otherwise, the exclusive should be upheld as a matter of law. Perhaps the Tenth Circuit, which relied on Judge Holtzoff's ruling, would have reached a different decision if it had had the benefit of the opinions of the District of Columbia Court of Appeals and of Judge Thomsen and the Fourth Circuit. In any event, since petitions for certiorari are expected to be filed in both *Schwing* and *Packard*, it may be that by this time next year the Supreme Court will have written the final chapter on this topic.

Turning to the related question concerning the validity of territorial restrictions in distributor agreements, we are no more enlightened at this juncture than we were a year ago. Following the example of Philco,<sup>15</sup> the J. P. Seeburg Corporation agreed to a consent decree without litigating the lawfulness of its restrictive agreements.<sup>16</sup> The decree prevents the defendant from limiting the territories within which its distributors may sell, but permits it to specify areas of primary responsibility.<sup>17</sup> The fact remains that to this day there has

<sup>14</sup> *Id.* at 421.

<sup>15</sup> *U. S. v. Philco Corp.*, 1956 Trade Cases par. 68,409 (E. D. Pa. 1956).

<sup>16</sup> *U. S. v. J. P. Seeburg Corp.*, 1957 Trade Cases par. 68,613 (N. D. Ill. 1957).

<sup>17</sup> ". . . Seeburg may exercise its right to choose and select its distributors and customers, to designate geographical areas in which such distributors shall respectively be primarily responsible for distributing coin operated phonographs,

been no authoritative judicial determination condemning territorial restrictions. Indeed, the law is to the contrary.<sup>18</sup>

## II.

The front page item of the current term was the Supreme Court's decision in the *duPont-General Motors*<sup>19</sup> case on Monday of this week. More startling than the ruling itself are its possible radiations unless, like some of the Court's other antitrust opinions, this one is "good for a single passage only."

The Court split four-to-two with three justices not participating. Mr. Justice Brennan, who wrote the opinion for the Court, was joined by the Chief Justice and Justices Black and Douglas—the three dissenters in last year's *Cellophane*<sup>20</sup> decision. The minority consisted of Justices Burton and Frankfurter.

The situation may not be unlike that which existed in the *Steel*<sup>21</sup> case where the Court divided four-to-three. Justice Holmes wrote in a letter to Harold Laski:

"I deeply regretted the situation of the Steel Trust Case—decided 4 to 3—without a majority of the whole court and with the probability that if the whole court could sit it would have gone the other way."<sup>22</sup>

Although the Government had initially charged the defendants with a broad conspiracy in violation of Sections 1 and 2 of the Sherman Act and had assailed duPont's acquisition of 23% of General Motors stock in 1917 and 1919 under both the Sherman and Clayton Acts, the Court confines its decision to a holding that the stock ownership contravened Section 7 of the Clayton Act of 1914.

That the Government's Clayton Act contention was merely a makeweight is apparent from the briefs. Only twenty of the seven

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to terminate the franchises of such distributors who do not adequately represent Seeburg and promote the sale of all coin operated phonographs manufactured by Seeburg in areas so designated as their primary responsibility, and such designation of suggested geographical areas, standing alone, shall not be considered a violation. . . . " *Id.* at p. 72,479.

<sup>18</sup> Handler, *supra* note 1, at 378.

<sup>19</sup> *U. S. v. E. I. duPont de Nemours & Co.*, 353 U. S. 586 (1957).

<sup>20</sup> *U. S. v. E. I. duPont de Nemours & Co.*, 351 U. S. 377 (1956).

<sup>21</sup> *U. S. v. United States Steel Corp.*, 251 U. S. 417 (1920).

<sup>22</sup> 1 HOLMES-LASKI LETTERS 248-49 (1953), March 4, 1920.

hundred and fifty pages of the briefs of the Department of Justice, duPont and General Motors were devoted to this issue. As Justice Burton notes in his dissent:

"In the closing pages of its brief, and for a few minutes in its oral argument, the Government added the assertion that duPont had violated §7 of the Clayton Act in that its stock interest in General Motors 'has been used to channel General Motors' purchases to duPont.' "<sup>23</sup>

A seven-month trial with a transcript of 8,283 pages dealing with a multiplicity of issues, all thoroughly and expertly developed by counsel in testimony and exhibits and carefully appraised by the district judge in an opinion of some 100 pages, now culminates in a determination by a minority of the full Court of what was, at most, merely a peripheral and supplementary claim.

The first question confronting the Court was whether the 1914 version of Section 7 applies to vertical integration. In holding that it does, the Court had to discard forty years of uniform administrative interpretation by both the Federal Trade Commission and the Department of Justice. It makes no effort to reconcile its present holding with its earlier decision in *International Shoe*,<sup>24</sup> which requires that there be "substantial competition" between the acquired and acquiring companies as a prerequisite to the application of the statute. According to the majority, such competition must exist where the first of the three Section 7 yardsticks is invoked; but it is not necessary where the claim is that the acquisition restrains commerce or tends to create a monopoly.

What is the Court's methodology in determining whether a vertical acquisition offends the statutory prohibitions?

It first endeavors to define the appropriate market:

"Determination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition 'within the area of effective competition.' Substantiation can be determined only in terms of the market affected."<sup>25</sup>

<sup>23</sup> *U. S. v. E. I. duPont de Nemours & Co.*, 353 U. S. at 609 (dissent). See also address by Robert A. Bicks, First Assistant, Antitrust Division, Antitrust Section of the American Bar Association, July 13, 1957.

<sup>24</sup> *International Shoe Co. v. F. T. C.*, 280 U. S. 291, 298-99 (1930).

<sup>25</sup> *U. S. v. E. I. duPont de Nemours & Co.*, 353 U. S. at 593.

Without any analysis of the facts and without the benefit of any finding of the trial judge, the Court by its own *ipse dixit* defines the market in terms of finishes and fabrics used in the automotive industry, despite clear evidence that these products were not generically different from those used in other industries. The defendants' contention regarding the market is thus summarized:

"Appellees argue that there exists no basis for a finding of a probable restraint or monopoly within the meaning of §7 because the total General Motors market for finishes and fabrics constituted only a negligible percentage of the total market for these materials for all uses, including automotive uses. It is stated in the General Motors brief that in 1947 duPont's finish sales to General Motors constituted 3.5% of all sales of finishes to industrial users, and that its fabrics sales to General Motors comprised 1.6% of the total market for the type of fabric used by the automobile industry."<sup>26</sup>

This is followed by the Court's dogmatic conclusion:

"The record shows that automotive finishes and fabrics have sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all other finishes and fabrics to make them a 'line of commerce' within the meaning of the Clayton Act. Cf. *Van Camp & Sons Co. v. American Can Co.*, 278 U. S. 245. Thus, the bounds of the relevant market for the purposes of this case are not coextensive with the total market for finishes and fabrics, but are coextensive with the automobile industry, the relevant market for automotive finishes and fabrics."<sup>27</sup>

Having thus delineated the market, the Court then lays down two substantive requirements:

"The market affected must be substantial. *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346, 357. Moreover, in order to establish a violation of §7 the Government must prove a likelihood that competition may be 'foreclosed in a substantial

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<sup>26</sup> *Ibid.*

<sup>27</sup> *Id.* at 593-95.

share of . . . [that market].’ Both requirements are satisfied in this case. The substantiality of a relevant market comprising the automobile industry is undisputed. The substantiality of General Motors’ share of that market is fully established in the evidence.”<sup>28</sup>

These passages represent the Court’s entire discussion of the substantive meaning of Section 7 in relation to vertical acquisitions. The reference to foreclosure is a direct quotation from *Standard Stations*.<sup>29</sup>

The conclusion of illegality is not rested on any affirmative showing that the stock purchase had any adverse effect on the competitors of either duPont or General Motors. Rather, it is assumed from the mere size and position of General Motors in the automotive industry and the quantum of its finish and fabric purchases from duPont. The reasoning runs as follows: Since General Motors produces almost one-half of the automobiles sold in the industry, it presumably consumes approximately one-half of the total finishes and fabrics used by the automotive industry. And since duPont in 1947 supplied 68% and 38.5% of General Motors’ finish and fabric requirements, respectively, duPont has a substantial share of the relevant market.<sup>30</sup> This share, the majority felt, was directly attributable to the acquisition. Although the trier of facts had specifically found to the contrary, the Court thought that: “The inference is overwhelming that duPont’s commanding position was promoted by its stock interest and was not gained solely on competitive merit.”<sup>31</sup>

The Court measures the legality of duPont’s ownership of General Motors stock by the conditions existing at the time suit was brought and not at the time of acquisition. Indeed, there is a veiled suggestion in the opinion that the purchase might not have been unlawful

<sup>28</sup> *Id.* at 595.

<sup>29</sup> *Standard Oil Co. of California v. U. S.*, 337 U. S. 293, 314 (1949).

<sup>30</sup> “Because General Motors accounts for almost one-half of the automobile industry’s annual sales, its requirements for automotive finishes and fabrics must represent approximately one-half of the relevant market for these materials. Because the record clearly shows that quantitatively and percentagewise duPont supplies the largest part of General Motors’ requirements, we must conclude that duPont has a substantial share of the relevant market.” *Id.* at 596.

<sup>31</sup> *Id.* at 605.

in 1917 or 1919.<sup>32</sup> The Court does not deem it unfair to set aside a transaction which occurred more than forty years ago. The purpose of the Clayton Act, it says, was to "arrest the creation of trusts, conspiracies, and monopolies *in their incipiency and before consummation.*" . . ." "Incipiency" in this context denotes not the time the stock was acquired, but any time when the acquisition threatens to ripen into a prohibited effect."<sup>33</sup> If there is a reasonable probability that the retention of the stock may result in the prohibited anti-competitive consequences, the Government may take action regardless of the passage of time.

Justice Burton takes sharp issue with the majority in its treatment of the law and the facts. Significantly, he was joined in his dissent by Justice Frankfurter, the father of "quantitative substantiality." The opinion opens with this warning note:

" . . . over 40 years after the enactment of the Clayton Act, it now becomes apparent for the first time that §7 has been a sleeping giant all along. Every corporation which has acquired a stock interest in another corporation after the enactment of the Clayton Act in 1914, and which has had business dealings with that corporation is exposed, retroactively, to the bite of the newly discovered teeth of §7."<sup>34</sup>

The dissent disagrees with the application of Section 7 to vertical integration. It analyzes the wording of the statute, its legislative history, the long course of administrative practice and the various judicial precedents,<sup>35</sup> concluding that the law relates to horizontal combinations only.<sup>36</sup>

Justice Burton finds no warrant in the statutory language, its history or prior construction for the majority's novel view that legality is dependent on the facts existing at the time of suit rather than of acquisition. He emphasizes that Section 7, by its terms, is directed at the unlawful *acquisition* rather than the unlawful *use* of stock. "The result [reached by the majority]," he concludes, "is to subject

<sup>32</sup> *Id.* at 599.

<sup>33</sup> *Id.* at 597.

<sup>34</sup> *Id.* at 611.

<sup>35</sup> E.g., *International Shoe Co. v. F. T. C.*, 280 U. S. 291 (1930).

<sup>36</sup> *U. S. v. E. I. duPont de Nemours & Co.*, 353 U. S. at 619.

a good-faith stock acquisition, lawful when made, to the hazard that the continued holding of the stock may make the acquisition illegal through unforeseen developments. Such a view is not supported by the statutory language and violates elementary principles of fairness.”<sup>37</sup>

Even if the majority were correct in applying Section 7 to vertical integrations and in measuring the anticompetitive effects at the time of suit, the dissenters would still hold that there had been no violation since there was, in their view, no showing of any reasonable probability of foreclosure of competition from a substantial share of the relevant market. To them such foreclosure means a significant restriction of access to needed supplies or needed outlets.<sup>38</sup> This can only be determined by a complete market analysis. “A mere showing that a substantial dollar volume of sales is involved cannot suffice.”<sup>39</sup> “Section 7 thus requires a case-by-case analysis of the relevant economic factors.”<sup>40</sup>

Justice Burton then presents a detailed analysis of the relevant facts found below which were not challenged on the appeal but were ignored by the Court. He points out that while thousands of duPont products could be used by General Motors, it actually obtains only a limited number from duPont, patronizing duPont’s competitors for the rest. He criticizes the Court for blinking its eyes to the many articles which General Motors declines to buy from duPont or which it buys only in small quantities. For example, General Motors in 1947 bought only .4% of its adhesives and .2% of its anodes from duPont. The record further discloses independent purchasing patterns by the various divisions of General Motors. Thus, Oldsmobile is the only division buying anti-freeze from duPont, while it is one of the

<sup>37</sup> *Id.* at 622.

<sup>38</sup> “When a vertical acquisition is involved, its legality thus turns on whether there is a reasonable probability that it will foreclose competition from a substantial share of the market, either by significantly restricting access to needed supplies or by significantly limiting the market for any product. See Report of the Attorney General’s National Committee to Study the Antitrust Laws (1955) 122-127. The determination of such probable economic consequences requires study of the markets affected, of the companies involved in relation to those markets, and of the probable immediate and future effects on competition.” *Id.* at 625.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Id.* at 626.

two automobile divisions which does not finish its cars with duPont's "Duco." Buick is the only division that uses duPont's motor enamel. No purchases at all are made by many divisions of various duPont undercoat paints, lacquers and varnishes.

Nor is there anything sinister about the fact that General Motors' purchases of finishes and fabrics represented a preponderant part of duPont's sales of such products to automotive customers. For the record clearly explains why Ford and Chrysler—the other larger automobile companies—were not significant customers of duPont. Ford had chosen to manufacture the major share of its requirements of fabrics and finishes and Chrysler had consistently followed the policy of selecting a single supplier to whom it would be the most important customer.

The minority accepts the finding of the lower court that the acquisition did not, in fact, foreclose duPont's competitors from selling General Motors either finishes or fabrics. There was no agreement of exclusive dealing; there was no agreement to prefer duPont; there was, in fact, no preference or favoritism. Purchases were made solely on their merits. And since the competitive opportunities of duPont's competitors had not been impaired for a period of thirty years, there was no reasonable likelihood of such impairment in the future.

The dissent then turns to the question of the relevant market. For this purpose it is willing to assume the correctness of the Court's conclusion that duPont's competitors have been or will be foreclosed from General Motors' paint and fabric trade. This fact alone is without legal significance unless the "foreclosure involves a substantial share of the relevant market and . . . significantly limits the competitive opportunities of others trading in that market."<sup>41</sup>

The minority's central thesis is that:

"The Clayton Act is not violated unless the stock acquisition substantially threatens the competitive opportunities available to others. . . . The effect on the market for the product, not that on the transactions of the acquired company, is controlling."<sup>42</sup>

Justice Burton finds no basis in the record for the Court's conclusion that automobile finishes and fabrics have sufficiently peculiar

<sup>41</sup> *Id.* at 648-49.

<sup>42</sup> *Id.* at 653.

characteristics and uses to constitute products distinct from all other finishes and fabrics. He asserts:

"The record does not show that the fabrics and finishes used in the manufacture of automobiles have peculiar characteristics differentiating them from the finishes and fabrics used in other industries. What evidence there is in the record affirmatively indicates the contrary."<sup>43</sup>

"We are not told what these 'peculiar characteristics' are. Nothing is said about finishes other than that Duco represented an important contribution to the process of manufacturing automobiles. Nothing is said about fabrics other than that sales to the automobile industry are made by means of bids rather than fixed price schedules. Dulux is included in the 'automobile' market even though it is used on refrigerators and other appliances, but not on automobiles. So are other finishes and fabrics used on diesel locomotives, engines, parts, appliances and other products which General Motors manufactures. Arbitrary conclusions are not an adequate substitute for analysis of the pertinent facts contained in the record."<sup>44</sup>

From his exhaustive review of the evidence, Justice Burton concludes that the automotive finishes and fabrics sold to General Motors by duPont were indistinguishable from like products sold to other nonautomotive industrial users and that General Motors' purchases from duPont were less than 3.5% of the national market for industrial finishes and about 1.6% of the nationwide total for industrial fabrics. In short, the dissent believes "that an insubstantial portion of this total market would be affected even if an unlawful preference existed or were probable."<sup>45</sup> Unlike the majority, Justices Burton and Frankfurter refuse to attach any significance to the fact that "duPont's sales of finishes and fabrics to General Motors were large in volume, and that General Motors was the leading manufacturer of automobiles during the later years covered by the record."<sup>46</sup>

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<sup>43</sup> *Id.* at 650.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Id.* at 654.

<sup>46</sup> *Ibid.*

What is the doctrinal significance of the decision?

Does it mean that every acquisition of stock in a customer since 1914 is now vulnerable to attack?

At best, the present decision could apply only to those vertical stock purchases which, at the time of suit, would have the anti-competitive consequences prescribed by the statute. This of itself rules out many of the transactions which have taken place during the past four decades. It is doubtful, however, that the Court intended to lay down a rule of universal application or that it is inviting the Department of Justice and the Federal Trade Commission to measure the probable anticompetitive effect of every post-1914 transaction by the conditions prevailing today. After a reading of the Government's brief and the majority opinion, one cannot escape the conclusion that both the facts and the law were tailored to meet the special circumstances of this one case. The inarticulate major premise is that the Clayton Act does not countenance the purchase by the fourth largest industrial concern of a substantial stock interest in the second largest corporation in America. It may well be queried whether the same result would ensue in cases of stock acquisitions involving companies of smaller dimensions.

What about purchases of assets consummated before 1950? Prior to its amendment, Section 7 did not apply to assets. Asset acquisitions are, however, subject to challenge under the Sherman Act. But a vast amount of decisional law would have to be overturned before Sherman Act proceedings could succeed. The last two pronouncements of the Supreme Court under the Sherman Act were *International Harvester*<sup>47</sup> and *Columbia Steel*,<sup>48</sup> in both of which the defendants prevailed.

Are horizontal stock acquisitions of early vintage likewise susceptible to attack?

Heretofore the first of the three Clayton Act standards has been treated as though the lessening of competition was to be tested in the entire market and not merely with respect to the competition between the acquired and acquiring companies. So far as stock acquisitions are concerned, the implication from both opinions is that the present

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<sup>47</sup> U. S. v. *International Harvester Co.*, 274 U. S. 693 (1927).

<sup>48</sup> U. S. v. *Columbia Steel Co.*, 334 U. S. 495 (1948).

Court, unlike the Court that sat in *International Shoe*,<sup>49</sup> is disposed to give the statute its full and literal meaning.

Congress was particularly careful both in 1914 and again in 1950 to exclude from the operation of its anti-merger enactments purchases that had been made before the effective date of the new legislation. The Court, on the contrary, gives retroactive scope to its new interpretations of the 1914 statute, upsetting an open and notorious stock ownership of long duration. Is it not patent that what is not deemed unfair to the industrial giants would be stigmatized as profoundly unjust to smaller business units?

Does the decision adopt quantitative substantiality as the controlling principle under the old and new versions of Section 7? Possibly so. The Court quotes from *Standard Stations*<sup>50</sup> and adopts its test of substantial foreclosure of a share of the market. But there are countervailing considerations not to be overlooked. The Clayton Act aspects of the litigation received only passing attention in the briefs. The critical literature on quantitative substantiality is not noted by the Court.<sup>51</sup> The precedents expressly rejecting the doctrine are not considered.<sup>52</sup> The fact that the Department of Justice and the Federal Trade Commission have both rejected this unsound rule is ignored.<sup>53</sup> The Court appears oblivious of the fact that the whole

<sup>49</sup> *International Shoe Co. v. F. T. C.*, 280 U. S. 291 (1930).

<sup>50</sup> *Standard Oil Co. of California v. U. S.*, 337 U. S. 293, 314 (1949).

<sup>51</sup> See, e.g., Adelman, *Economic Analysis and Critique of the Facts Considered in Judging the Legality of Mergers*, 21 CURRENT BUSINESS STUDIES 21, 22 (1954); Carson, *Corporate Mergers*, CCH, How to COMPLY WITH THE ANTITRUST LAWS 279, 285 (1954); Donovan, *Mergers and the Antitrust Laws*, 1 ANTITRUST BULL. 179, 185 (1955); Gwynne, *The Federal Trade Commission and Section 7*, 1 ANTITRUST BULL. 523, 529 (1956); Handler, *Quantitative Substantiality and the Celler-Kefauver Act—A Look at the Record*, 7 MERCER L. REV. 279, 289 (1956); Handler, *Monopolies, Mergers and Markets—a New Focus*, TRADE REGULATION SYMPOSIUM 17, 32 (1955); Massel, *The New Section 7*, 1 ANTITRUST BULL. 543, 547 (1956).

<sup>52</sup> *U. S. v. Brown Shoe Co.*, 1956 Trade Cases par. 68,244, p. 71,114 (E.D. Mo. 1956); *Transamerica Corp. v. Board of Governors*, 206 F. 2d 163, 170 (3d Cir. 1953), cert. denied, 346 U. S. 901 (1953); *Pillsbury Mills, Inc.*, FTC Dkt. 6000, CCH TRADE REG. REP. (9th ed.) par. 11,582, p. 12,545 (1953). See also *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 1957 Trade Cases par. 68,735, pp. 73,010, 73,012 (S. D. N. Y. 1957) (decided three days after *duPont-General Motors*).

<sup>53</sup> See Barnes, *Quantitative Substantiality*, 8 ABA ANTITRUST SECTION REPORT 11 (1956); Address by Attorney General Brownell, National Industrial Conference Board, November 17, 1955; Address by Assistant Attorney General Barnes, Judicial Conference, Third Circuit, July 6, 1955; Address by Assistant Attorney General Barnes, Northwestern University Law School, May 10, 1955; Address by Assistant

current of professional, administrative and judicial opinion is opposed to the application of this concept to mergers and stock acquisitions.

The Court's opinion does not explicitly reject the Attorney General Committee's gloss on the language of *Standard Stations*.<sup>54</sup> Justice Burton argues that there is foreclosure of competition from a substantial share of the market only when there is a significant restriction of access to needed supplies or a significant limitation of access to needed outlets. Foreclosure has no real meaning when unrelated to market conditions. I do not believe, therefore, that in future cases, when the Court apprehends the dangers to our entire antitrust philosophy resulting from a mechanical adherence to quantitative substantiality, it will sanction the rule in merger litigations. This may be wishful thinking, however, and certainly, no one can shut his eyes to the words and the implications of the majority opinion. If the ruling presages the adoption of quantitative substantiality under amended Section 7 in cases not involving the largest industrial corporations of America, then the precedent will have a sweeping impact.

The relationship of the present decision to *Cellophane* presents an interesting exercise in the reconciliation of judicial precedents. Three of the four members of the majority were the dissenters in *Cellophane*. Their hostility to last year's ruling has apparently not abated. But, nowhere in their opinion do they cast any doubt on the validity of *Cellophane* as a binding authority. The case is not even cited. The delineation of the market is predicated upon an assumed state of facts. The Court assumes that automobile finishes and fabrics have sufficiently peculiar characteristics and uses to warrant their being differentiated from all other finishes and fabrics. To be sure, as the dissent emphasizes, this conclusion is completely unsupported by the record. But on the factual assumption made, automobile finishes and fabrics would by hypothesis constitute a separate market within the *Cellophane* doctrine. If the finishes and

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Attorney General Brownell, New York Chapter of the Public Relations Society of America, September 30, 1954; FTC REPORT ON CORPORATE MERGERS AND ACQUISITIONS 162, 180-85 (1955); cf. REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 122 (1955); cf. Handler, *Annual Antitrust Review*, 11 THE RECORD 367, 381 (1956).

<sup>54</sup> REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 141-44 (1955).

fabrics used on automobiles in fact possess "sufficiently peculiar characteristics and uses" differentiating them from all other finishes and fabrics used in industry, by definition the two types are not reasonably interchangeable for the same end use.

It is highly hazardous to essay the role of a prophet in gauging the doctrinal import of any new case, particularly one as dramatic as this which only saw the light of day some 72 hours ago. Unanimous opinions prevail by the strength of their authority; an opinion by a minority of the Court must rely upon its inherent fairness and logic. The dissent is faithful to the record. It makes no blithe assumptions for which there is no evidentiary support. It faces up to all the difficulties which the case presents. It does not evade the relevant legislative, administrative and judicial materials. Even accepting the majority's major premises, it finds that the undisputed facts of the record compel a different result.

Is it not, therefore, probable that in other litigations involving other parties, this ruling of the four Justices will be treated as a *sui generis* precedent to be limited to its peculiar facts? Cannot the decision be interpreted to mean this only—it is wrongful for one of America's largest companies to hold stock in a customer, described by the majority as "the colossus of the giant automobile industry"?<sup>55</sup> Is not the dissent likely to win ultimate acceptance in the free market place of ideas?

### III.

Ever since *Fashion Originators' Guild*<sup>56</sup> upheld a refusal to consider evidence in justification of a group boycott, it has commonly been supposed that concerted refusals to deal are among those restraints which are illegal *per se* under the Sherman Act. The sweeping dicta of the Supreme Court in *Kiefer-Stewart*,<sup>57</sup> *Columbia Steel*,<sup>58</sup> and *Times-Picayune*<sup>59</sup> have served to reinforce this view. More recently, however, several lower federal courts have cast doubt on whether the doctrine is truly a rule of invariable prohibition.<sup>60</sup>

<sup>55</sup> *U. S. v. E. I. duPont de Nemours & Co.*, 353 U. S. at 595.

<sup>56</sup> *Fashion Originators' Guild v. F. T. C.*, 312 U. S. 457, 467-68 (1941).

<sup>57</sup> *Kiefer-Stewart v. Seagram*, 340 U. S. 211, 214 (1951).

<sup>58</sup> *U. S. v. Columbia Steel Co.*, 334 U. S. 495, 522 (1948).

<sup>59</sup> *Times-Picayune Pub. Co. v. U. S.*, 345 U. S. 594, 625 (1953).

<sup>60</sup> *U. S. v. Insurance Board of Cleveland*, 144 F. Supp. 684 (N. D. Ohio 1956); *Union Circulation Co. v. F. T. C.*, 241 F. 2d 652 (2d Cir. 1957); *Interborough News*

These courts would exercise a discriminating judgment between those boycotts which are so patently injurious to competition as to admit of no legal justification, and those having less obvious anti-competitive repercussions so as to warrant application of the rule of reason in determining their legality.

Probably the most thoughtful and comprehensive judicial synthesis of the decisional law on this subject is contained in Judge McNamee's opinion in *U. S. v. Insurance Board of Cleveland*.<sup>61</sup> In that case, both sides having moved for summary judgment, the District Court was called upon to adjudicate the validity of certain exclusionary rules promulgated by an association of insurance agents which dominated the local market. The Government argued that the challenged rules constituted an agreement to boycott and as such were unlawful *per se*. The defendant association admitted the boycott but contended that its conduct was sheltered by the rule of reason. After reviewing the leading Supreme Court decisions in which group boycotts had been condemned, Judge McNamee concluded "that in all of them the vice of illegality was inherent in the unlawful objectives of the combination and in the means employed to accomplish their purposes."<sup>62</sup> He found that each case involved "coercive action against parties outside the group."<sup>63</sup> From this he deduced that the rule of *per se* invalidity applied only to those boycotts "where a combination seeks by coercion, intimidation, or threats to compel outsiders to do or refrain from doing that which the group approves or condemns, and where the purpose or necessary effect of the combination is to unduly restrain or monopolize interstate commerce."<sup>64</sup>

Judge McNamee then launched into a penetrating analysis of the economic thrust of three specific association rules.<sup>65</sup> The upshot was the invalidation of one rule as an unreasonable restraint of trade

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*Co. v. Curtis Publishing Co.*, 127 F. Supp. 286, 300 (S. D. N. Y. 1954), *aff'd*, 225 F. 2d 289 (1955).

<sup>61</sup> 144 F. Supp. 684 (N. D. Ohio 1956).

<sup>62</sup> *Id.* at 697-98.

<sup>63</sup> *Id.* at 698.

<sup>64</sup> *Ibid.*

<sup>65</sup> These rules deny membership in the association to agents dealing with insurance companies which sell insurance directly to policyholders, contribute to the overhead expense of agents, or are mutual rather than stock companies.

and the reservation of decision as to the validity of the other two pending a trial at which further evidence would be received on the question of competitive injury.<sup>66</sup>

Essentially the same reading of the authorities led the Second Circuit to refuse to invoke a rule of *per se* invalidity in *Union Circulation Co. v. F. T. C.*<sup>67</sup> The boycott consisted of agreements by each of several agencies which sold magazine subscriptions and represented "a very substantial segment of the industry,"<sup>68</sup> not to hire any door-to-door solicitors who had been employed by another agency during the preceding year. These "no-switching" contracts had been attacked as unfair methods of competition under Section 5 of the Federal Trade Commission Act. The agencies sought to justify the restraints on the ground that they were designed to prevent fraudulent practices by solicitors, since proper standards and discipline were difficult to maintain if employees were free to move about from one agency to another.

The Court of Appeals ruled that "when the courts or the Commission are confronted with an alleged boycott whose deleterious effect on competition is not as apparent on its face as that of the agreements which have been held illegal *per se*, they may consider its actual or potential impact upon the competitive fabric of the particular industry affected."<sup>69</sup> The boycott at issue, the court felt, belonged in this category. The court went on, therefore, to consider the restraint under the rule of reason. Believing it to be reasonably foreseeable that the restriction would have the effect of "freezing" the labor supply—an indispensable element of the door-to-door magazine selling trade—the court visualized that not only would competition be diminished between existing subscription agencies, but that newcomers would be prevented from breaking into the field. Accordingly, it affirmed the Commission's order, holding that the

<sup>66</sup> On substantially similar facts, the court in *U. S. v. New Orleans Insurance Exchange*, 148 F. Supp. 915, 919-20 (E. D. La. 1957), held that the association's exclusionary membership rules violated Sections 1 and 2 of the Sherman Act. While Judge Wright deemed it unnecessary to decide the case on a *per se* basis, he stated that any group boycott or concerted refusal to deal "must, at the very least, be viewed with dark suspicion because of the commercial restraints and tendency toward monopoly inherent in such combinations." *Id.* at 920.

<sup>67</sup> 241 F. 2d 652 (2d Cir. 1957).

<sup>68</sup> *Id.* at 654.

<sup>69</sup> *Id.* at 656.

agreements constituted an unreasonable restraint of trade within the meaning of the Sherman Act.

At this stage of the game it is still too early to discern the full significance of this growing judicial disinclination to hue to the strict *per se* doctrine in the boycott field. This revival of the early Sherman Act view that certain boycotts are justifiable<sup>70</sup> raises a series of interesting questions of major doctrinal import.

Does the rule of reason as envisaged in these cases parallel that applicable to exclusive distributorships where the inquiry centers upon the availability of competing sources of supply or outlets? Stated differently, is the controlling issue whether the boycotting group is subject to effective outside competition?

Can the concerted refusal to deal by a group enjoying monopoly power ever be justified?

Or is the rule of reason approach similar to that outlined in *Times-Picayune*,<sup>71</sup> where all the anticompetitive effects of the challenged restraint are objectively appraised and not merely the group's economic strength?

Must the refusal be activated by socially and economically acceptable reasons?

What significance is to be attributed to the fact that the group refusal produces serious injury to the plaintiff's business or property?

As far as the importance of monopoly power is concerned, it is interesting to note that the combination in *Insurance Board of Cleveland* controlled 80% of the market. Nevertheless, Judge McNamee refused to condemn the exclusionary rules without a detailed factual inquiry. The Seventh Circuit indicated several years ago that there would be no liability were every fire insurance company in the country to make a solemn pledge not to insure a known arsonist.<sup>72</sup> The Second Circuit's decision in the "no-switching" case suggests that an exclusionary agreement producing serious anticompetitive injury would not be saved by reason of its valid business purpose.

<sup>70</sup> *Hopkins v. U. S.*, 171 U. S. 578 (1898); *Anderson v. U. S.*, 171 U. S. 604 (1898); cf. *U. S. v. American Livestock Com.* Co., 279 U. S. 435 (1929).

<sup>71</sup> *Times-Picayune Pub. Co. v. U. S.*, 345 U. S. 594 (1953).

<sup>72</sup> *Ruddy Brook Clothes v. British & Foreign Marine Ins. Co.*, 195 F. 2d 86, 89 (7th Cir. 1952), cert. denied, 344 U. S. 816 (1952).

I would not hazard a guess, and certainly do not profess to know, how the Supreme Court will ultimately resolve any or all of these perplexing questions, or what weight, if any, will be given the factors of monopoly power, existence of effective uncontrolled competition, business justification, adverse effect on competition, or harm to the party boycotted. The only thing that seems reasonably clear to me is that it is not particularly fruitful to analyze the problem in terms of whether the boycott has a coercive effect on third parties outside the group. A group boycott by its very nature involves coercion and inescapably has an impact on the outsiders against whom it is directed. Such an approach introduces no real flexibility into the standards of legality governing joint refusals to deal.

#### IV.

The much maligned meeting competition defense in the Robinson-Patman Act has been subjected to more than usual attention during the past year in the courts, before the Commission, and in legislative hearings. Some slight clarification has resulted, but the antitrust bar is still left in a quandary as to the precise scope of the proviso.

In *Staley*<sup>73</sup> the Supreme Court held that imitation of the clearly discriminatory pricing system of a competitor did not constitute meeting competition in "good faith" within the meaning of Section 2(b). This engendered the belief in some quarters that the defense required proof that the competitor's price which was being matched was itself lawful.

This gloss upon Chief Justice Stone's opinion acquired added luster when the Supreme Court in *Standard of Indiana*<sup>74</sup> twice alluded, in passing, to "a lawful and equally low price of a competitor."<sup>75</sup> But in *Standard Oil Co. v. Brown*,<sup>76</sup> the Fifth Circuit recently declined to accept this dictum as controlling<sup>77</sup> and squarely refused to saddle a defendant with the burden of proving that the equally low price being met was, in fact, a lawful price. It recognized that

<sup>73</sup> *F. T. C. v. Staley Mfg. Co.*, 324 U. S. 746 (1945).

<sup>74</sup> *Standard Oil Co. v. F. T. C.*, 340 U. S. 231 (1951).

<sup>75</sup> *Id.* at 238, 246.

<sup>76</sup> 238 F. 2d 54 (5th Cir. 1956).

<sup>77</sup> "There is nowhere a suggestion that the seller must carry the burden of proving the actual legality of the sales of its competitors in order to come within the protection of the proviso." *Id.* at 58.

such a requirement would vitiate the defense since the inquiry into "these collateral issues would be endless."<sup>78</sup> Were a contrary view accepted, it would be incumbent upon a defendant to ascertain if his competitor's price could be cost justified, or if it too was made in good faith in order to meet the lawful and equally low price of another competitor—facts which are hardly accessible to a competing enterprise.<sup>79</sup> It is important to note, however, the Fifth Circuit's qualification that there would be a failure to prove "good faith" if the seller knew that the price being met was unlawful, or if that price were "inherently illegal" as in *Staley*.

On remand in *Standard of Indiana*,<sup>80</sup> the Seventh Circuit indicated that a seller who meets an unlawful price may not invoke the good faith defense, but found "not even a suspicion" that the prices of Standard's competitors were unlawful.<sup>81</sup> Significantly, the court absolved the respondent without insisting on an affirmative showing that such prices were lawful.

There is thus no inconsistency between the views of the Fifth and Seventh Circuits. The teaching of both cases is that a seller is not obliged to prove that the price of his competitor is lawful, though the defense is not available where the price being met is patently unlawful or the seller is aware of its illegal character.

This also appears to be the implication of the Supreme Court's recent *National Lead*<sup>82</sup> decision. Having found that the respondents had conspired to use a zone delivered pricing system, the Commission sought to prohibit not only the conspiracy, but also individual adoption of a similar system for the purpose or with the effect of "matching" competitive prices. In sustaining the Commission's power to obtain such relief, the Court stated that the proviso of Section 2(b) would be read into the order so as to permit "a seller in good faith to meet the lower price of a competitor."<sup>83</sup> In this connection, the Court emphasized that the statute was "designed to protect competitors in individual transactions," as distinguished from sanctioning "the

<sup>78</sup> *Id.* at 58, n. 7.

<sup>79</sup> See *Automatic Canteen Co. v. F. T. C.*, 346 U. S. 61, 69 (1953).

<sup>80</sup> *Standard Oil Co. v. F. T. C.*, 233 F. 2d 649 (7th Cir. 1956), cert. granted, 25 U. S. L. WEEK 3183 (U. S. Dec. 18, 1956) (No. 465).

<sup>81</sup> *Id.* at 654.

<sup>82</sup> *F. T. C. v. National Lead Co.*, 352 U. S. 419 (1957).

<sup>83</sup> *Id.* at 431.

use of an entire pricing system." <sup>84</sup> It is noteworthy that the Court did not condition the protection of competitors in "individual transactions" on their meeting a lawful price.

Certiorari has been granted in *Standard of Indiana*.<sup>85</sup> While the issues appear to be primarily factual, it may be that the Court will grasp the opportunity to dispel some of the fog which still shrouds the "good faith" defense.

In *Enterprise*,<sup>86</sup> the Second Circuit was asked to overturn a lower court ruling and hold that since the Robinson-Patman Act condemns discrimination having anticompetitive effects among either sellers or buyers, it also exonerates price differences which are calculated to enable buyers to meet competition in good faith at their own level. The Court of Appeals dismissed the complaint because of a failure to prove damages and never reached this pregnant legal question. Thus we are still without any definitive appellate ruling on this aspect of the defense.

The unhappy drafting of the Robinson-Patman Act continues to plague us. In *Henry Rosenfeld, Inc.*,<sup>87</sup> the Commission held that the meeting competition defense was not available where the respondent had been charged with violating Section 2(d) because of a failure to proportionalize advertising allowances. The Commission recognized that the defense might have applied had the complaint alleged a Section 2(e) violation by virtue of the disproportionate furnishing of services or facilities. Nevertheless, it felt constrained to adhere to the "barebones" language of the statute,"<sup>88</sup> and injected still another anomaly into the Act.

I can think of no policy justification for differentiating between Sections 2(d) and 2(e)—provisions which are complementary in nature. This decision serves to underscore the slipshod drafting of the Robinson-Patman Act and its failure to deal consistently with cognate practices of the market place.

Although the Second Circuit's *Enterprise* opinion does not shed any light on the manner in which competition may be met under

<sup>84</sup> *Ibid.*

<sup>85</sup> 25 U. S. L. WEEK 3183 (U. S. Dec. 18, 1956) (No. 465).

<sup>86</sup> *Enterprise Industries v. Texas Co.*, 136 F. Supp. 420, 421 (D. Conn. 1955), *rev'd*, 240 F. 2d 457 (2d Cir. 1957), *cert. denied*, 353 U. S. 965 (1957).

<sup>87</sup> FTC Dkt. 6212, CCH TRADE REG. REP. (10th ed.) par. 26,068 (1956).

<sup>88</sup> *Id.* at p. 35,928.

the Robinson-Patman Act, its rejection of a rule of automatic damages in a private action for price discrimination, and the denial of certiorari by the Supreme Court, represents a development of paramount importance. To put it simply, a purchaser claiming to be the victim of an unlawful price differential must *prove* that he was injured—and the extent of that injury—as a proximate result of the violation; injury and damages may not be *presumed* from the mere fact of discrimination.

The lower court in *Enterprise* had awarded the plaintiff damages based on the amount of the price differential without requiring any proof of actual damages.<sup>89</sup> In so doing the court relied on the decision of the Eighth Circuit in *Gus Blass*.<sup>90</sup> Curiously enough, Judge Smith ignored his own circuit's prior decision in *Sun Cosmetic*,<sup>91</sup> where Judge Learned Hand had called for proof of actual loss to the plaintiff's business in a case of discrimination arising under Sections 2(d) and 2(e) of the Act.

On appeal the defendant in *Enterprise* argued that Congress had specifically considered and rejected a rule of automatic damages in Robinson-Patman Act litigation,<sup>92</sup> that the point was not in issue in *Bruce's Juices*,<sup>93</sup> that a stray dictum in that case by Mr. Justice Jackson was uttered without the benefit of briefing, that the Eighth Circuit itself had backtracked in *Russellville Canning*,<sup>94</sup> and that the rationale of Mr. Justice Cardozo in a rate discrimination case under the Interstate Commerce Act was analogically apposite.<sup>95</sup> In the *ICC* case a unanimous Supreme Court had ruled that:

"When discrimination and that alone is the gist of the offense, the difference between one rate and another is not the measure of the damages suffered by the shipper. . . . The question is not

<sup>89</sup> *Enterprise Industries v. Texas Co.*, 136 F. Supp. at 422-23.

<sup>90</sup> *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F. 2d 988, 996 (8th Cir. 1945), cert. denied, 326 U. S. 773 (1945).

<sup>91</sup> *Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp.*, 178 F. 2d 150, 153 (2d Cir. 1949).

<sup>92</sup> See H. R. REP. No. 2951, 74th Cong., 2d Sess. 8 (1936).

<sup>93</sup> *Bruce's Juices v. American Can Co.*, 330 U. S. 743, 757 (1947).

<sup>94</sup> *American Can Co. v. Russellville Canning Co.*, 191 F. 2d 38, 55 (8th Cir. 1951).

<sup>95</sup> *I. C. C. v. U. S.*, 289 U. S. 385 (1933).

how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others have paid less." <sup>96</sup>

The Court analyzed the nature of the actionable harm flowing from discrimination as follows:

"If by reason of the discrimination the preferred producers have been able to divert business that would otherwise have gone to the disfavored shipper, damage has resulted to the extent of the diverted profits. If the effect of the discrimination has been to force the shipper to sell at a lowered market price . . . damage has resulted to the extent of the reduction. But none of these consequences is a necessary inference from discrimination without more." <sup>97</sup>

On the basis of the clear legislative history and the persuasive authority of *ICC*, the Second Circuit reversed and dismissed the *Enterprise* complaint, since the plaintiff had been able to show neither a diversion of sales nor a lowering of his price as a consequence of the price differences.

It has been said in some quarters that *Enterprise* makes it virtually impossible for a plaintiff to prevail in a treble damage action for price discrimination. It is undoubtedly true that when the nonfavored buyer sustains no injury to his business or property, which Section 4 of the Clayton Act makes a condition precedent to maintenance of a private action, it will be impossible to sue for treble damages. Recovery, however, is not precluded where the discrimination produces harm either through diversion of business or loss of profits resulting from a reduced market price. Were a rule of automatic damages sanctioned, a bonanza would be conferred on private suitors even in the absence of proof of injury. It is not true that it can rationally be assumed that price discrimination invariably brings injury in its wake. One has only to study the record in the *Enterprise* case to realize why such an assumption cannot safely be made.

When all is said and done, one comes back to the fundamental premise of a private action for treble damages—*injury to the*

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<sup>96</sup> *Id.* at 389-90.

<sup>97</sup> *Id.* at 390-91.

plaintiff's business by reason of a violation of law. Without proof of injury and damages, there certainly can be no recovery for an infraction of the Sherman Act. I can think of no reason why the same proof should not be required where a claim is asserted under Robinson-Patman.

## V.

By and large, antitrust consent decrees make rather dull reading and contribute little to the practitioner's store of substantive knowledge. Frequently, these judgments are cast in a stereotyped mold geared to prevent one or more well known generic restraints. Sometimes the boilerplate is coupled with tailor-made provisions designed to cope with more unusual patterns of conduct. But since these decrees are not accompanied by any findings of fact or adjudication of illegality, and since they are often the product of hard bargaining and represent a compromise, they rarely provide any insight into how the court would have decided the case had it been litigated.

Within the past year, however, I ran across a consent decree which made exceptionally interesting reading. It was entered by the United States District Court for the Southern District of Georgia in a price-fixing suit brought by the Department of Justice against a trade association of movers of household goods.<sup>98</sup> I had always supposed that price-fixing was illegal *per se* and that a trade association engaging in such activity might be dissolved. The decree did nothing to disturb these preconceived notions. The defendants were enjoined from price-fixing and ordered to dissolve the association. The startling thing about the decree was that it was entered without the consent of the Government. Only the defendants had acquiesced in its entry. As is customary in the case of all consent decrees, the judgment recited that there had been no trial or adjudication of any issue of fact and that the defendants had not admitted the commission of any illegal acts charged in the complaint.

To the best of my knowledge, this marks the first occasion on which a court has accepted a consent decree in an antitrust action

<sup>98</sup> *U. S. v. Aero Mayflower Transit Co., Inc.*, 1956 Trade Cases par. 68,526 (S. D. Ga. 1956).

without the agreement of both parties. Back in 1940, a similar unilateral proffer was rejected by another federal district court.<sup>99</sup> Personally, I have always proceeded on the assumption that if a proposed consent decree was not satisfactory to the Government, a defendant had no judicial recourse, short of defending the case on the merits or admitting the allegations of the complaint and then endeavoring to persuade the court to grant only limited relief. If the federal court in Georgia is correct, all of us may have been missing a good bet.

But on closer analysis, precisely what is a consent judgment worth to a defendant when it is obtained without the approval of the Government?

Since the court has jurisdiction of the parties and subject matter, the decree in all probability would not be deemed a nullity.<sup>100</sup> I would expect that if the defendant wilfully contravened its provisions, he would be subject to punishment for contempt at the suit of the Government. I hardly think that it would be a defense to assert that the Government did not consent to the issuance of the decree in the first instance.

It seems equally clear that the decree could not be introduced in evidence against the defendant as *prima facie* evidence under Section 5 of the Clayton Act<sup>101</sup> in a private treble damage action. Regardless of whether such a decree is a true "consent judgment" within the meaning of statutory proviso, it would be inadmissible because it was "entered before any testimony has been taken."<sup>102</sup>

<sup>99</sup> *U. S. v. Hartford-Empire Co.*, CCH TRADE REG. REP. (8th ed.) par. 25,548 (N. D. Ohio 1940).

<sup>100</sup> *Stoll v. Gottlieb*, 305 U. S. 165, 171-72 (1938); *Thompson v. Whitman*, 85 U. S. (18 Wall.) 457, 465 (1874); see *Walling v. Miller*, 138 F. 2d 629, 631 (8th Cir. 1943), cert. denied, 321 U. S. 784 (1944); 7 MOORE, FEDERAL PRACTICE 259-71 (2d ed. 1955).

<sup>101</sup> 69 STAT. 283 (1955), 15 U. S. C. § 16.

<sup>102</sup> Section 5(a) provides as follows:

"A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be *prima facie* evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has

Moreover, the defendant has not admitted any violation, and Section 5 can only be invoked where the decree attests to an infraction. In view of the absence of any testimony, findings of fact, or determination of illegality, it is difficult to imagine as to what matters such a decree might operate as an estoppel.<sup>103</sup>

So far, so good. The defendant has lost nothing by circumventing the Government and taking his consent decree directly to the court. The fly in the ointment lies in the Government's right of appeal. If the Government is truly dissatisfied with the relief granted by the district court, there is no doubt about the fact that it can bring the matter before an appellate tribunal.<sup>104</sup> Since there has been no trial and the defendant has admitted nothing (except jurisdiction perhaps),<sup>105</sup> the district court was in no position to make the findings of fact and conclusions of law required by Rule 52 of the Federal Rules of Civil Procedure.<sup>106</sup> Manifestly, without any inkling as to what the defendant did or did not do, the reviewing court has no guideposts to enable it to determine whether the court below abused its discretion in denying the Government additional relief. Indeed, it might even be questioned whether the lower court, by issuing an injunction while ignorant of the facts, had any basis on which to exercise its discretion in the first place. Confronted with an inadequate record, I fail to see how the appellate court would have any alternative but to reverse the judgment and remand the case for appropriate findings by the trial court. This would be tantamount to ordering a trial of the case, unless the Government and the defense could agree on the form of a consent order or at

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been taken or to judgments or decrees entered in actions under section 15a of this title."

<sup>103</sup> Cf. *Emich Motors Corp. v. General Motors Corp.*, 340 U. S. 558 (1951).

<sup>104</sup> *U. S. v. Hartford-Empire Co.*, CCH TRADE REG. REP. (8th ed.) par. 25,548 (N. D. Ohio 1940); *U. S. v. Institute of Carpet Mfrs. of America*, 1940-43 Trade Cases par. 56,097 (S. D. N. Y. 1941); see *Swift & Co. v. U. S.*, 276 U. S. 311, 324 (1928); *Walling v. Miller*, 138 F. 2d 629, 631 (8th Cir. 1943), cert. denied, 321 U. S. 784 (1949).

<sup>105</sup> The decree in *Aero Mayflower* even lacks the jurisdictional declarations typically found in consent decrees to the effect that (1) the court has jurisdiction over the subject matter and parties, and (2) the complaint states a cause of action under the antitrust laws.

<sup>106</sup> Of course, where both sides consent to a decree, there can be no appeal on the merits and therefore findings of fact or conclusions of law are unnecessary.

least to stipulate the facts. In short, the parties would be right back where they started.

If the Government were powerless to prevent a defendant from obtaining a unilateral consent decree, the result would be little short of chaotic. The courts would be inundated with requests by private litigants to issue decrees to their liking. A rejection of one request might serve only to breed another. Instead of having a single centralized and informed agency providing a modicum of consistency and uniformity in the relief meted out, several hundred district judges, acting without knowledge of the facts, would be dispensing all sorts of different decrees dealing with what in many instances might be essentially similar situations. There would be a complete frustration of the administrative process. Decrees based on unilateral consent would only add to the uncertainties which already abound in this field.

A parallel problem in the relationship between the executive and judicial branches of the Government arises in the acceptance of the plea of *nolo contendere* in criminal prosecutions. The primary purpose of a consent decree is to resolve the pending controversy by affording the public appropriate relief without exposing the defendant to treble damage liability as a result of the *prima facie* effect of the judgment. By the same token, the *raison d'etre* for a plea of *nolo contendere* is to vindicate the public interest through the imposition of criminal penalties without prejudicing the defendant in a later civil action through operation of the doctrine of estoppel. There is a specific federal rule granting discretion to the court in receiving a plea of *nolo*<sup>107</sup> but there is no comparable civil rule lodging a like discretion in the judicial acceptance of a consent decree.

Several recent decisions have served to highlight the active role which the judiciary takes in considering whether to take a plea of *nolo contendere*.<sup>108</sup>

<sup>107</sup> Rule 11 of the Federal Rules of Criminal Procedure, 18 U. S. C., provides in pertinent part: "A defendant may plead not guilty, or, with the consent of the court, *nolo contendere*."

<sup>108</sup> *U. S. v. Standard Ultramarine & Color Co.*, 137 F. Supp. 167 (S. D. N. Y. 1955); *U. S. v. Cigarette Merchandisers Ass'n*, 136 F. Supp. 212 (S. D. N. Y. 1955); *U. S. v. B. F. Goodrich Co.*, 1957 Trade Cases par. 68,713 (D. Colo. 1957).

Refusing a *nolo* plea in *Standard Ultramarine*,<sup>109</sup> a price-fixing case, Judge Weinfeld expressed the view that it was not in the public interest to deprive private treble damage suitors of the evidentiary benefits of an adjudication of guilt under Section 5 of the Clayton Act. The Department of Justice had opposed the plea on that very ground, but Judge Weinfeld made clear that he did not attach controlling significance to the Government's opposition. The position of the prosecutor was deemed only one of several relevant factors, such as the nature and duration of the claimed violation, the size and power of the defendants, the impact of their alleged conduct on the economy, and "whether a greater deterrent effect will result from conviction rather than from acceptance of the plea."<sup>110</sup>

The difficulty with Judge Weinfeld's emphasis on Section 5 of the Clayton Act as a consideration in declining a *nolo* plea is that his rationale applies with equal force to consent decrees. Unless the court would reject the tender of a consent judgment under the same set of facts—and I am using "consent" in its ordinary meaning to denote acquiescence by both sides—I can perceive no logical reason for turning down a plea of *nolo*. In neither event will the judgment be available to private parties. And since the courts traditionally have bowed to the decision of the Department of Justice in approving consent decrees, I think it should be a most extraordinary case before a judge precludes a *nolo* plea when the Government acquiesces.

At least two district courts have disagreed with Governmental opposition to pleas of *nolo contendere*. In one case Judge Sugarman accepted the plea over the objection of the Department.<sup>111</sup> But the judge was careful to point out that private parties would not necessarily be deprived of the benefits of Section 5 because the Government had instituted a companion civil action against the same defendants.

However, the issue was squarely met by Judge Breitenstein a few months ago when he permitted the defendants in a price-fixing case to

<sup>109</sup> *U. S. v. Standard Ultramarine & Color Co.*, 137 F. Supp. 167 (S. D. N. Y. 1955).

<sup>110</sup> *Id.* at 172.

<sup>111</sup> *U. S. v. Cigarette Merchandisers Ass'n*, 136 F. Supp. 212 (S. D. N. Y. 1955).

change their pleas from not guilty to *nolo* despite strenuous Governmental objection.<sup>112</sup> He pointed out in his opinion that the *nolo* plea has always existed in the federal courts, that it is authorized by a specific rule of procedure, that the plea has been accepted in many antitrust prosecutions, and that Congress did not see fit to curb its use when it amended Section 5 in other respects two years ago.<sup>113</sup> From this, Judge Breitenstein drew the inevitable conclusion that "the intent of Congress has been to retain the plea of *nolo contendere* in antitrust cases and that the use of such a plea if permitted by the Court is not contrary to the public interest."<sup>114</sup>

The court then turned to the factors which should control the exercise of its discretion. It did not take the position that a plea of *nolo* would be accepted willy nilly. Rather it declared that the defendants had to present "an exceptional circumstance" warranting favorable exercise of the court's discretion.<sup>115</sup> In this connection, the judge rejected the defense argument that the prospect of treble damage litigation which confronted the defendants was such an exceptional circumstance. Otherwise, as the judge properly pointed out, the exception would most certainly swallow the rule. In the last analysis the court was prompted to accept the plea because the congested status of its docket "is such that public interest requires that everything be done which can properly be done to expedite the trial and disposition of lawsuits."<sup>116</sup> But it indicated that calendar congestion is not deemed a controlling factor for all cases.

To my mind, Judge Breitenstein's analysis of the irrelevance of Section 5 in exercising judicial discretion under Rule 11 seems unassailable. A judge to whom a plea of *nolo* is tendered in an antitrust case should consider the same factors that he would consider in evaluating the plea in any criminal prosecution. He should give no thought to the defendant's possible treble damage exposure,

<sup>112</sup> *U. S. v. B. F. Goodrich Co.*, 1957 Trade Cases par. 68,713 (D. Colo. 1957).

<sup>113</sup> The 1955 amendments made the estoppel provisions of Section 5 applicable to suits brought by the United States for injuries to its business or property. The second paragraph of Section 5, which dealt with suspension of the running of the statute of limitations, was altered to accommodate the uniform four-year period of limitations enacted at that time.

<sup>114</sup> *U. S. v. B. F. Goodrich Co.*, 1957 Trade Cases at p. 72,878.

<sup>115</sup> *Id.* at p. 72,876.

<sup>116</sup> *Id.* at p. 72,878.

either in accepting or rejecting the plea. Acceptance of the plea on that score is destructive of the court's discretion. Rejection on that ground precludes the use of the plea in the settlement of criminal antitrust cases.

In short, while the purposes of both consent decrees and *nolo* pleas coincide, their proper utilization must take into account the divergent statutory and administrative framework into which each is cast. A procedure requiring a bilateral agreement should not be accepted on any other basis by the courts. By the same token, a device essentially unilateral which focuses on the discretion of the judiciary should not be subject to the arbitrary veto of the prosecutor or rejected for reasons essentially irrelevant to the proper purpose and use of the plea. Unless these simple tenets are observed, instruments admittedly performing useful and desirable functions in the settlement of controversies will lose much of their effectiveness.

## BASEBALL, PROFESSIONAL SPORTS AND THE ANTITRUST ACTS

by

FREDERIC A. JOHNSON\*

### *Introduction*

This article essays to prove that the Sherman Act<sup>1</sup> complemented the guaranty against the grant of monopolies by Congress that was provided in the privileges and immunities clause of Article IV of the Constitution;<sup>2</sup> that the Act was intended by Senator Sherman to carry forward the original policy of section 1 of the 14th Amendment;<sup>3</sup> that was to be done by shielding every individual in the United States from the abridgement of his opportunity to earn a livelihood through monopolistic control; and that such control was to be curbed by reenforcing the jurisdiction of the States Courts with national authority.<sup>4</sup> The conclusion derived from these propositions is that Congress lacks the power either to continue the exemption of the uniform contract of the professional baseball player from the antitrust acts; an exemption, that was erroneously accorded to it by the Supreme Court in *Toolson v. New York Yankees, Inc.*,<sup>5</sup> or to grant such exemptions to the contracts of the professional football player and the prize fighter; exemptions, that were subsequently denied by the same Court in *Radovich v. National Football League*<sup>6</sup> and *United*

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<sup>1</sup> 26 Stat. 209.

<sup>2</sup> U. S. CONST. art. IV, §2, cl. 1.

*Privileges and immunities of citizens.*—The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

<sup>3</sup> U. S. CONST. Amdt. XIV §1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

<sup>4</sup> *U. S. v. Underwriters Assn.*, 322 U. S. 533, 559, note; *U. S. v. Aluminum Co. of America*, 148 F. 2d 416, 428 note.

<sup>5</sup> 346 U. S. 356 (1953).

<sup>6</sup> 352 U. S. 445 (1957).

*States v. International Boxing Club*,<sup>6a</sup> denies that by inescapable implication apply to all professional sports.<sup>7</sup>

## I

### *The Sherman Act and the 14th Amendment*

The circumstance which tends to reenforce the argument that any exemption of professional sports from the antitrust acts is unconstitutional centers around the decision of the Court of Appeals for the Second Circuit in *Gardella v. Chandler*.<sup>8</sup> Gardella, similarly to Radovich the football player, had been blacklisted by Organized Baseball for joining an independent club and League after his contract for the previous season had expired. Organized Baseball had anticipated the football and boxing clubs in negotiating contracts to supply a substantial portion of its revenue amounting to many millions of dollars annually through the sale of the rights to advertisers of nationally and internationally distributed products to broadcast and telecast its games.

When the *Gardella* complaint was sustained by the United States Court of Appeals, Congress had not investigated Organized Baseball or any other professional sport since 1922 and there was no ground for finding legislative approval of its structure. Although Judge Learned Hand did not concur with Judge Frank in proclaiming that the reserve clause was shockingly like peonage and had had no counterpart in this country since The War Between The States, he did not dissent from that denunciation.<sup>9</sup> The reserve clause is the paragraph in the uniform contract of the professional Baseball and Football player and of other members of professional teams, which confers upon the club the sole and exclusive option to hold the performer under contract for the next season during his entire life as a professional athlete.<sup>10</sup> Gardella terminated the requirement inferred from previous cases that a plaintiff had to be engaged in interstate

<sup>6a</sup> 348 U. S. 236 (1955).

<sup>7</sup> Frankfurter, *J.*, dissenting, *Ibid.*, 248; cf. the further dissent by the same Justice in *Radovich*, *supra*, 455.

<sup>8</sup> 172 F. 2d 402—2 Cir.—1949.

<sup>9</sup> *Ibid.*, 409.

<sup>10</sup> Johnson, *The Law of Sports: The Unique Performer's Contract and the Anti-trust Laws*, II *The Antitrust Bulletin*, 251 (1957).

commerce to recover in a treble damage action under the Sherman Act.<sup>11</sup> In principle, no distinction exists between *Gardella* and *Radovich*. *Toolson* would therefore appear to represent unabashed recourse to the dispensing power,<sup>12</sup> to save Baseball from ruin by treble damage actions, an eventuality which will virtually be certain if the game is not reorganized.

*Federal Club v. National League*,<sup>13</sup> decided in 1922, was no precedent for *Toolson*. By that former opinion and "in its very terms, the *Federal Baseball* decision was limited to the factual situation of baseball as it was conducted at that time and as it was described in the record before the Court."<sup>14</sup> Further the Report of the Congressional Subcommittee which investigated Organized Baseball between *Gardella* and *Toolson* refused to recommend to Congress the proposed exemption of Baseball from the antitrust statutes.<sup>15</sup>

The subsequent inclusion of team games, accomplished through the interpretation of the antitrust acts by *Radovich*, was not coincidental. To a wider degree than has been admitted, Organized Baseball illuminates the radical change in the popular and professional outlook that has intervened in regard to the Civil War since the enactment of the Sherman Law. Until the outbreak of World War I furnished a perspective for public appreciation of the film, "The Birth of a Nation," the majority of the American people considered that epochal domestic struggle and its aftermath as the media for restoring the Union and freeing the slaves. John Montgomery Ward, the leader of the players, in preparing for their revolt and the formation of a league of their own upon the eve of the introduction by John Sherman

<sup>11</sup> Note, Effect of *Gardella* on the Treble Damage Suit, 44 Ill. L. Rev. 492, 498 *et seq.* (1949).

<sup>12</sup> *Burns v. McCormick*, 233 N. Y. 230, 235 (1922):

"A power of dispensation, departing from the letter in supposed adherence to the spirit, involves an assumption of jurisdiction easily abused, and justified only within the limits imposed by history and precedent. The power is not exercised unless the policy of the law is saved (*Pound, Equity and the Statute of Frauds*, 33 Harvard Law Review, 933, 944); *REPORT OF U. S. ATT'Y GEN. NAT. COMM.* pp. 63-64 (1955).

<sup>13</sup> 259 U. S. 200 (1922).

<sup>14</sup> Amicus Brief of U. S. in *Radovich v. National Football League*, *supra*.

<sup>15</sup> Burton, J., dissenting in *Toolson v. New York Yankees, Inc.*, 346 U. S., at 361 note.

of his Antitrust Bill in the Senate, appealed for popular support in reliance upon the terms of the Emancipation Proclamation.<sup>16</sup>

While we admit today that the outstanding constitutional phenomena of the Civil War were nationalization and the 14th Amendment, the Supreme Court before its October Term for 1936 clung to federal norms of interpretation in differentiating manufacture from commerce.<sup>17</sup> This distinction adhered to the aphorism predicated by Chief Justice Chase for the judicial approval given to the theory of Reconstruction in *Texas v. White*:<sup>18</sup>

"The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

Rather curiously, the differentiation of commerce from manufacture in its negation of the authority of the United States as a sovereign among the family of Nations in its competence to regulate trade was, upon principle, in pursuance of the practical insulation of interstate dealing in slaves from the power of Congress through the dictum of Chief Justice Taney in *Groves v. Slaughter*<sup>19</sup> in 1837. As a postulate of political science, federalism in all commercial matters received equal support from the warning of De Tocqueville at the flood tide of Jacksonian Democracy.<sup>20</sup> He prophesied that tyranny would emanate from the centralization of power under the impetus of the repeated depressions that take place in an industrialized society.<sup>21</sup>

That the Supreme Court is heeding his admonition is plain. After foreshadowing in *United States v. International Boxing Club*<sup>22</sup> the reversal of *Toolson*, by bringing pugilists under the Sherman Act for their participation in championship fights before television audiences

<sup>16</sup> [Spalding America's National Game—Baseball—270, 272 New York—American Sports Publishing Company—1911] 40 Lippincott's Magazine, 310 (1887); H. R. Rep. No. 2002, 82d Cong. 1st Sess. 32 (1952).

<sup>17</sup> *Carter v. Carter Coal Co.*, 298 U. S. 238 (1936); *Hummer v. Dagenhart*, 247 U. S. 151 (1918); *Kidd v. Pearson*, 128 U. S. 1 (1888); Johnson, The Commerce Power, Monopoly and Contracts, 30 Temple L. Quart., 270, 289 *et seq.* (1957).

<sup>18</sup> 74 U. S. (7 Wall.) 700, 725 (1869), quoted in *Carter v. Carter Coal Co.*, *supra*, p. 295 and in *Ashton v. Cameron County Dist.*, 298 U. S. 513, 528 (1936).

<sup>19</sup> *Groves v. Slaughter*, 40 U. S. (15 Pet.) 449, 508 (1841).

<sup>20</sup> De Tocqueville, Democracy In America, I, Preface by the Translator (London—1889).

<sup>21</sup> *Ibid.*, II, 308-312 (Phillips Bradley Ed.—New York—1945).

<sup>22</sup> 348 U. S., *supra*, 242.

in order to advertise manufactured products, the Court at its past Term in *Radovich* for like reasons included Football and confined *Toolson* to its own facts.<sup>23</sup> This arrival of national hegemony over these extreme phases of industry has shunted aside the limitations of the 10th Amendment upon the commerce power. The series of opinions handed down toward the close of the past Term<sup>24</sup> to elevate into prime importance the individual guaranties of constitutional rights demonstrates their role as compensating limitations for the contemporary subordination of the 10th Amendment.

The spread of the commerce power over the reserve clause, simultaneously with the augmentation of the guaranties of personal rights, connotes the union for the protection of the professional athletes of these ordinarily opposing streams of legal growth. Their cooperation, however, is general under the Sherman Act, to conserve the rights of the individual performer of personal services from the extra-judicial blacklist of a national or an international combination of entrepreneurs.<sup>24a</sup>

Since *Radovich* has halted this method, the Sherman Act assumes its true character as an institutional advance over the object sought by the framers of the 14th Amendment of protecting the individual citizen against state power in his quest for a livelihood. In advocating the adoption of this proposed Amendment in an address before a large audience in Cincinnati during the Congressional campaign of 1866, Senator Sherman declared:<sup>25</sup>

"The first section was an embodiment of the Civil Rights Bill, namely: that everybody—man, woman and child—without regard to color, should have equal rights before the law; that is all there is to it; that everybody born in this country or naturalized by our laws should stand equal before the laws—should have the right to go from county to county, and from

<sup>23</sup> 352 U. S., *supra*, 451.

<sup>24</sup> *Service v. Dulles*, 354 U. S. 363 (1957); *Watkins v. U. S.*, *Ibid.*, 1178; *Sweezy v. State of New Hampshire*, *Ibid.*, 234; *Reid v. Covert*, *Ibid.*, 1.

<sup>24a</sup> *U. S. v. Shubert*, 348 U. S. 222 (1955); *Anderson v. Shipowners Assn.*, 272 U. S. 359 (1926); *Ring v. Spina*, 148 F. 2d 647 (2 Cir.—1945); *Marienelli v. United Booking Offices*, 227 F. 165 (U. S. D. C. S. D. N. Y.—1914).

<sup>25</sup> Cincinnati Commercial, September 29, 1866, p. 1, col. 4, quoted by Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights?", 2 Stan. L. Rev. 5, 77 (1949).

State to State, to make contracts, to sue and be sued, to contract and be contracted with; that is the sum and substance of the first clause. \* \* \*

This prior step in constitutional development reveals the motive of Senator Sherman, as well as the degree of institutional progress that he sponsored through his proposed legislation, to subject what was the equivalent of an economic government to the jurisdiction of the United States Courts.<sup>26</sup> The pervading compulsion of the antitrust states to vindicate this policy of the United States has again been highlighted upon remand and after trial by *United States v. International Boxing Club*. Judge Ryan restrained Norris and Wirtz, the principal officers and stockholders of Madison Square Garden, from further participation in its affairs and from ownership of their stock. The decree of Judge Ryan discloses the breadth of the commerce power as part of the sovereign authority of the United States. Any reversal of modification would apparently affect no more than his discretionary disposition of the matter. The import of this enlarged domain of Constitutional Law must be searched for the inhibitions that it contains against the exemption of professional sports from the Sherman Act.

## II

### *National Sovereignty, the 14th Amendment and Slavery*

The deeprooted sanction for free opportunities for employment was forged in American Law amid the bitter controversies engendered by the Wilmot Proviso.<sup>27</sup> They were fanned into white heat and intersectional strife through the *Dred Scott*<sup>28</sup> decision. The consti-

<sup>26</sup> "Senator Sherman, explaining his bill to the Senate, stated, 'It is to arm the Federal courts within the limits of their constitutional power that they may co-operate with the State courts in checking, curbing and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States.' 21 Cong. Rec. 2457." *U. S. v. Underwriters Assn.*, 322 U. S., *supra*, 559 note; Foraker, Notes of a Busy Life, II, 166 (Cincinnati—1916).

<sup>27</sup> Rhodes, History of the United States From the Compromise of 1850. Vol. I. 89 (Harper & Brothers Publishers—New York—1893).

<sup>28</sup> 60 U. S. (19 How.) 393 (1857).

tutional thrust of the antitrust statutes in their envelopment of personal services has to be gauged by a comparison between the restrictions upon national authority that were prescribed in *Dred Scott* and *Groves v. Slaughter*, on the one side, and the sovereign authority of the United States which emerged on the other in opposition; fundamentally to *Dred Scott*, through Civil War and Reconstruction; and ultimately as an inevitable corollary, to *Groves v. Slaughter*, by the nationalistic interpretations of the interstate commerce beginning with the early months of 1937.<sup>29</sup>

Reference to the Wilmot Proviso is indispensable to account for the stunted institutional range of the federal government in the 1850's. Without that explanation, the premises for the reaction that produced our current nationalism will lie hidden in obscurity. The Proviso in the phraseology of the Northwest Ordinance was introduced in Congress in 1846 to exclude slavery from any territory that might be acquired from Mexico.<sup>30</sup> At that period, no enumerated provision in the Constitution empowered the United States to prohibit slavery. The Proviso accordingly encountered the prevailing federalism in the Constitutional Law of the 1850's in regard to the government of the territories together with the relics of the medieval law of status with respect to the negro. Both of these ramparts had to be successfully levelled by the Republican statesmen who had the foresight to align the policy of anti-slavery with nationalism.<sup>31</sup>

Each of these ramparts had been erected during the Colonial Period and their constitutionality was upheld, or at any rate acknowledged, by the opinion delivered for the Court by Chief Justice Taney in *Dred Scott*; soundly, it would seem, from the level of institutional immaturity.

The status of the negro was predetermined. After 1715, negro slaves had been imported into the southern colonies at a quota above 27,000 annually.<sup>32</sup> The concern in Parliament over this traffic did not apparently accomplish any amelioration.<sup>33</sup> That trade was not

<sup>29</sup> Stern, The Commerce Clause and the National Economy, 1933-1946, 59 Harv. L. Rev. 645, 883 (1946); and That Commerce Which Concerns More States Than One, 47 *Ibid.*, 1335 (1934).

<sup>30</sup> Rhodes, *op. cit. supra*, note 27 at 89-90.

<sup>31</sup> Malin, The Nebraska Question, 1852-1854, 415.

<sup>32</sup> 4 Andrews, The Colonial Period of American History, 346 (Cambridge, 1938).

<sup>33</sup> *Ibid.*

illegal until January 1, 1808, when the prohibitions of Fox's Act<sup>34</sup> and Article I, section 9 of the Constitution<sup>35</sup> had become law. These humane interdictions were probably close to dead letters.<sup>36</sup> The slave remained a chattel in American law<sup>37</sup> and occasional emancipation, as Chief Justice Taney knew from his own acts of manumission, had not furthered assimilation or desegregation. Hence, his dicta in *Dred Scott* that the negro, slave or free, was not a citizen was a forerunner of sociological jurisprudence by a great Judge in describing the archaic law of persons in the United States.

This gap between the humanity which the Chief Justice displayed in private life and the law which he expounded in his public capacity was matched by the absence of any institutional growth that connected the governments of the territories with the Congress of the United States. This hiatus had likewise antedated the American Revolution. After the Treaty of Paris had confirmed the conquest by Great Britain of Canada and the eastern half of the Mississippi Valley, Pontiac's Rebellion broke out. When the news reached London, further settlements by white men were prohibited west of the Appalachian Divide, ostensibly as a temporary measure, by the precipitate drawing of Lord Hillsborough's Line in October, 1763.<sup>38</sup> Thenceforth, Great Britain recognized the claims of the Indian tribes to the western lands; contrary to the previous rule, they were extinguishable only by treaty made under royal authority.<sup>39</sup> Great Britain abandoned also the policy adopted in 1754, of granting 1000 acres of land to every actual settler,<sup>40</sup> and thereby prepared the path for the myriad intrigues of the large land companies.<sup>41</sup> The disposition, besides, of the typical placeman in the British administration of that period was to treat Lord Hillsborough's Line as permanent

<sup>34</sup> 46 Geo. III C. 52 (1806).

<sup>35</sup> U. S. CONST. art. I §9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight. \* \* \*

<sup>36</sup> Moore, *American Diplomacy*, 75-79 (New York and London, 1905).

<sup>37</sup> *Hooks v. Smith*, 18 Ala. 338 (1850).

<sup>38</sup> Abernethy, *Western Lands and the American Revolution*, 11, 12 (New York, London, MCMXXXVII).

<sup>39</sup> *Ibid.*, 12.

<sup>40</sup> *Ibid.*, 368.

<sup>41</sup> *Ibid.*, *et seq.*

in defiance of its own wording.<sup>42</sup> The Earl of Shelburne, alone, wrestled earnestly with the problems of the western territories.<sup>43</sup> He envisioned them as a region disparate from either Canada or the Continental Colonies.<sup>44</sup>

That the Continental Congress had never subjected these lands to any form of constitutional rule is obvious. The requisite unanimous acceptance by the States of The Articles of Confederation as a condition of ratification was delayed until the States with claims to these western lands had surrendered them in favor of the central government. The lack of any basis on its part for exercising lawful control over this territory is manifest from Madison's admission that the Northwest Ordinance was passed by the Continental Congress without constitutional authority from The Articles.<sup>45</sup>

After the Constitution was adopted, the power of Congress to acquire and govern territories would seem to have been implied from the treaty making power and the authority of Congress to admit new States into the Union.<sup>46</sup> Before *Dred Scott*, it has now been clarified by the distinction of *American Insurance Co. v. Cantor*<sup>46a</sup> in *Reid v. Colvert*<sup>47</sup> that no precedent existed to sanction the deprivation by Congress of private property rights in the Territories under Article IV, section 3 of the Constitution.<sup>47a</sup> The lack of any institutional ties before the Civil War between the territorial governments and Congress, to sustain such deprivation by a statute of the United States, is evident from Senator Foraker's thorough analysis in 1903 of the nature of federal suzerainty over the Territories within the present confines of the forty-eight States, in his effective oppo-

<sup>42</sup> Metzger, An Appraisal of Shelburne's Western Policy, 19 Mid-America, 169, 179 (1937).

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*, 177.

<sup>45</sup> The Federalist, No. XXXVIII, 291 at 299 (John C. Hamilton Ed. Philadelphia—1865).

<sup>46</sup> U. S. CONST. Art. II §2; Art. III §3.

<sup>46a</sup> 26 U. S. (1 Pet.) 511 (1828).

<sup>47</sup> 254 U. S. *supra*, 50, 53; see also, *Ibid.* 12-14; 74-75.

<sup>47a</sup> *Dred Scott v. Sandford*, 60 U. S. (19 How.) *supra*, 442-443. U. S. CONST. Art. IV §3—

"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."

sition to Joint Statehood for Arizona and New Mexico.<sup>48</sup> Each Territory had been entitled to admission as a State through customary understanding when its population was sufficient to elect one Representative to Congress.<sup>49</sup> The unabated lacuna introduced by Great Britain in 1763 was also exposed by the obligation of the United States to respect Indian titles recognized by treaty inside of the boundaries of what eventually became Oklahoma, the 46th State.<sup>50</sup> It further appears from *Reid v. Colvert*<sup>51</sup> that the United States was unquestionably bound by the 5th Amendment, as Chief Justice Taney asserted,<sup>52</sup> to provide just compensation to any slaveholders throughout the Louisiana Territory who may have been deprived of their property by the Missouri Compromise in contravention of the treaty with France for the purchase of her domains.<sup>53</sup> The principle is thoroughly settled that the United States is required by the 5th Amendment to pay just compensation to persons deprived unduly of their property by the incidences of the treaty making power<sup>54</sup> or by congressional legislation.<sup>55</sup>

In the realm of property, Constitutional Law was mature before the Civil War. It had lagged within the provinces of status and territorial government. In conscious and diametrical opposition to the principles pronounced by Chief Justice Taney in respect to these regions of arrested institutional development, the 13th and 14th Amendments were ratified. The 13th Amendment abolishes slavery wherever the jurisdiction of the United States extends.<sup>56</sup> The opening sentence of the first section of the 14th Amendment conferred citizenship upon the negro.<sup>56a</sup> It was the second sentence that was drafted to afford to the negro and to every other citizen full freedom throughout the Nation from abridgment by state action of his

<sup>48</sup> 36 Cong. Rec. 842.

<sup>49</sup> *Ibid.*, 948, 949, Foraker, op. cit. II, 184-189.

<sup>50</sup> *Ibid.*, 843.

<sup>51</sup> 254 U. S. *supra*, 8-14, 50, 66.

<sup>52</sup> 60 U. S. (19 How.) *supra*, 448, 449.

<sup>53</sup> 254 U. S. *supra*, 13, n. 26 citing *Rasmussen v. U. S.*, 197 U. S. 516, 520-521.

<sup>54</sup> *U. S. v. Shoshone Tribe*, 304 U. S. 111 (1938).

<sup>55</sup> *McCray v. U. S.*, 195 U. S. 27, 61 (1904); *Chicago, Burlington & Quincy R. R. Co. v. Chicago*, 166 U. S. 266 (1897).

<sup>56</sup> *Downes v. Bidwell*, 182 U. S. 244, 274-277; Littlefield, The Insular Cases, 15 Harv. L. Rev. 169, 281 (1901). Foraker, Notes of a Busy Life II, 75-77 (Cincinnati 1916).

<sup>56a</sup> *Slaughter House Cases*, 83 U. S. (16 Wall.) 36, 73 (1873).

rights to go from State to State, to contract and to sue.<sup>57</sup> These clauses express the indomitable will of the Radical Republicans during Reconstruction to prevent any relapse into peonage within the United States or throughout its jurisdiction.

These Amendments galvanized the sovereignty of the United States and the citizenship of the negro in support of that policy. The judicial exposition of the first section of the 14th Amendment confirmed the preexistence of that authority with all of the implications of power attributable to a sovereign at International Law in governing its territories where slavery was concerned.<sup>58</sup> These constructions upheld irrefutably as a statement of the supreme law from the date when it was announced the dissenting opinion of Justice Curtis in *Dred Scott*.<sup>59</sup>

Nevertheless, except for the legislation by Congress over banking<sup>60</sup> and currency,<sup>61</sup> the retrocession of federal power inaugurated by the Supreme Court under Chief Justice Taney over the ordinary conduct of mercantile affairs through a strict construction of the interstate commerce clause was progressively maintained throughout the Reconstruction Period.<sup>61a</sup> Under these interpretations, the concurring opinion of Justice Johnson in *Gibbons v. Ogden*<sup>62</sup> passed unnoticed. That jurist, it is submitted, had correctly ascribed the commerce power to the features of International Law which had been vested as a unit within the exclusive control of Congress.<sup>63</sup> This doctrine

<sup>57</sup> Mr. Justice Field dissenting, *ibid.*, 91, 93.

<sup>58</sup> *Downes v. Bidwell*, *supra*; *Slaughter House Cases*, *supra*; Littlefield, op. cit., *supra*, 285.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Veazie Bank v. Feno*, 75 U. S. (8 Wall.) 533 (1870).

<sup>61</sup> *Legal Tender Cases*, 79 U. S. (12 Wall.) 457 (1871).

<sup>61a</sup> *Munn v. Illinois*, 94 U. S. 118 (1877); *Railroad Co. v. Maryland*, 88 U. S. (21 Wall.) 456 (1875).

<sup>62</sup> 22 U. S. (9 Wheat.) 1, 222; Johnson, The Commerce Clause of the Constitution: A Derivative of Sovereignty at International Law, 1 N. Y. Law Forum, 429, 441-443 (1955).

<sup>63</sup> 22 U. S. (9 Wheat.) *supra*, 227-230.

The treaties of the United States seem almost invariably to denominate commerce and navigation as synonymous (e.g., The Treaty With France of 1778, I Malloy, United States Treaties and Conventions [Washington—1910], 468, 469; Treaty of Commerce and Navigation With Austria-Hungary of 1829, *ibid.*, 29; Treaty of Friendship, Commerce and Navigation With the Argentine Confederation of 1853, *ibid.*, 20; Renewed Treaty of Peace and Amity With Algiers of 1816, *ibid.*, 11. See Article I therein at 12). The even flow of commerce has been main-

was submerged by the cleavage of the police power of the States from the commercial jurisdiction of Congress through the unanimous opinion handed down by Chief Justice Chase in *United States v. De Witt*.<sup>64</sup> That decision began the erstwhile formidable line of precedents which declared Acts of Congress unconstitutional as violations of the interstate commerce clause.<sup>65</sup> A permanent offshoot of the federalistic interpretations of that clause was accentuated by the 5-4 decision in the *Slaughter House Cases*.<sup>66</sup> The opinion of the Court created the distinction between the privileges and immunities of citizens of the United States in Article IV and the respective privileges and immunities of citizens of the several States under the first section of the 14th Amendment. It further narrowed the protection of this clause in that Amendment to negroes, contrary to the well nigh authoritative views of Senator Sherman among others.<sup>67</sup> Accordingly the majority upheld the monopoly granted to butchers by the Louisiana legislature in and around New Orleans. The majority opinion in order to validate this exertion of the police power combined a reliance upon *United States v. De Witt* and *City of New York v. Miln*.<sup>68</sup> The latter was the first interpretation of the commerce power by the Supreme Court under Chief Justice Taney and it excluded natural persons as the subject thereof.<sup>69</sup>

This point has unmistakably been overruled;<sup>70</sup> and despite the *De Witt* opinion, the interstate commerce power has time and again been employed to exercise the functions that are analogous to the police power of the States.<sup>71</sup> Under these circumstances,

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tained on behalf of the railroads by executive power (*In re Debs*, 158 U. S. 564 [1895]); the free interstate flow of commodities was validly provided for by the Fair Labor Standards Act of 1938 [52 Stat. 1063; 29 U. S. C. §207] *Overnight Motor Co. v. Missel*, 316 U. S. 572 [1942]); and the local distribution of news and advertisements was protected by the Sherman Act as "an inseparable part of the flow of the interstate commerce involved." (*Lorain Journal Co. v. U. S.*, 242 U. S. 143, 152 [1951].)

<sup>64</sup> 76 U. S. (9 Wall.) 41 (1869).

<sup>65</sup> Stern, op. cit., *supra*, note.

<sup>66</sup> *Supra*, 83 U. S. (16 Wall.) 36.

<sup>67</sup> *Ibid.*, 71; Address at Cincinnati, op. cit., *supra*, n. 26; Flack, The Adoption of the Fourteenth Amendment, 268 (Baltimore—1908).

<sup>68</sup> 36 U. S. (11 Pet.) 102 (1837); see 83 U. S. (16 Wall.), *supra*, 63-64.

<sup>69</sup> 36 U. S. (11 Pet.) 102.

<sup>70</sup> *Edwards v. California*, 314 U. S. 160 (1941).

<sup>71</sup> *Jacob Ruppert v. Caffey*, 251 U. S. 264, 301 (1919); *Hamilton v. Kentucky Distilleries & Warehouse Co.*, *Ibid.*, 146, 156 (1920).

*The Slaughter House Cases* by the margin of one vote sustained a monopoly granted under the police power, interpreted at its zenith as against a natural person whose rights under the commercial law of the Union were construed at its nadir.

Where United States citizenship is involved, the privileges and immunities clause in Article IV of the Constitution sets forth an express limitation against the power of Congress to grant monopolies.<sup>71a</sup> This was evidenced by the minority of four in *The Slaughter House Cases*. Their dissents, as emphasized in the separate opinions of Justice Fields<sup>71b</sup> and Bradley,<sup>72</sup> attempted vainly to fix the identical obstacle against state legislation by a synonymous interpretation of state and federal citizenship for the pertinent clauses of the 14th Amendment and Article IV. When the question of the constitutionality of the Louisiana grant of monopoly arose again before the Court in *Butchers' Union v. Crescent City Co.*,<sup>73</sup> Mr. Justice Bradley reiterated in renewed dissent the basic hostility of Constitutional Law against monopolies. He reviewed this inherited and transmitted hostility from the common law and the Statute against Monopolies,<sup>73a</sup> to germinate the concept of an inalienable liberty to follow one's calling by derivation from the privileges and immunities clause of the 14th Amendment.<sup>74</sup> Had this doctrine become engrafted upon that clause, it would have been an absolute inhibition against state legislation and would correspondingly have not been amenable to the rule of reason.<sup>75</sup> This rule is inherent in the States in the exercise of their police power in accord with the due process and equal protection clauses of the 14th Amendment.<sup>76</sup>

These clauses, as the concurring opinion of the late Judge Frank in *Gardella* suggests, apply the broadening scope for the vindication of the rights of performers.<sup>77</sup> By parity of reason, since restrictive covenants between private parties have been made unenforceable by

<sup>71a</sup> Johnson, op. cit., *supra*, note 17 at 281.

<sup>71b</sup> *Supra*, 83 U. S. (16 Wall.) at 83.

<sup>72</sup> *Ibid.*, 111.

<sup>73</sup> 111 U. S. 746 (1884).

<sup>73a</sup> 21 Jac. I, c. 3 (1623).

<sup>74</sup> Warren, The New "Liberty" Under the Fourteenth Amendment, 39 Harv. L. Rev., 431, 447.

<sup>75</sup> *Ibid.*, 447, 463.

<sup>76</sup> *Home Bldg. & L. Assn. v. Blaisdell*, 290 U. S. 398 (1934).

<sup>77</sup> 172 F. 2d *supra*, 410.

these clauses, without the earlier necessity for state action through its legislative or executive departments,<sup>78</sup> the adjudications spelling out the limits of specific performance for personal service contracts<sup>79</sup> should define the rule of reason under the antitrust acts. Unless that rule is thus defined, grave doubt will hereinafter be shown to exist as to the constitutionality of the Sherman Act in allowing the monopolistic combinations in professional sports to deprive the performers of their inalienable right to pursue their calling as among the ordinary occupations of life. A disregard of these equities in contracting with professional athletes will be in derogation of their privileges and immunities as citizens of the United States that are guaranteed by Article IV. Such a definition of the rule of reason in accordance with the apposite principles of specific performance would carry out the policy of the Sherman Act for professional sports and for Baseball in particular. Senator Sherman elucidated this purpose for his proposed legislation. It was to supplement to the full extent of the constitutional power of the United States Court the jurisdiction of the State Courts over national and international trusts.<sup>80</sup>

<sup>78</sup> *Shelley v. Kraemer*, 334 U. S. 1 (1948); *Hurd v. Hodge*, *Ibid.*, 24 (1948); cf. *Barrows v. Jackson*, 346 U. S. 249 (1953).

<sup>79</sup> *Phila. Ball Club, Ltd. v. Lajoie*, 202 Pa. 210 (1902); *Arthur v. Oakes*, 63 F. 310, 317-318.

<sup>80</sup> *U. S. v. Aluminum Co. of America*, 148 F. 2d 416 (2 Cir.—1945), 428, n. 1.

"If the concerted powers of this combination are intrusted to a single man, it is a kingly prerogative, inconsistent with our form of government, and should be subject to the strong resistance of the State and national authorities \* \* \* 21 Cong. Record, 2457.

"The popular mind is agitated with problems that may disturb social order, and among them all none is more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition. These combinations already defy or control powerful transportation corporations and reach State authorities. They reach out their Briarean arms to every part of our country. They are imported from abroad. Congress alone can deal with them, and if we are unwilling or unable there will soon be a trust for every production and a master to fix the price for every necessity of life. \* \* \* 21 Cong. Record, 2460. See also 21 Cong. Record 2598."

Note 26 herein, p. 6, *supra*, contains the quotation of a statement of the same purport by Senator Sherman (21 Cong. Rec. 2457). The quotation appears in *U. S. v. Underwriters Assn.*, 322 U. S., *supra*, 559 note.

Senator Sherman was the author of the Antitrust Act of July 2, 1890. That the motivating spirit behind this legislation was his own has been confirmed. This con-

## III

*The Unconstitutionality of Exemption  
for Baseball and Other Sports*

The opinion of the majority in *Toolson* rests upon a reading into the *Federal Club* decision of an implied approval of the reasonableness of the reserve clause.<sup>81</sup> Since *Radovich*, this application of the Sherman Act to Organized Baseball is discriminatory in relation to the rights of its players within the due process guaranty of the 5th Amendment.<sup>81a</sup>

Before 1922, the game had shed the structure, unparalleled before and afterward, that was depicted by the testimony of the members of the National Commission upon the trial of the *Federal Club* case in the spring of 1919. The Commission had never reacquired its reputed superintendence over Baseball in the wake of the Federal League War of 1914 and '15.<sup>81b</sup> The transformation into its modern type of administration did not intervene until January, 1921. At that juncture, Judge Landis succeeded the National Commission as the governing head of Baseball and the New Major League Agreement instead of the National Agreement of 1903 was adopted as its supreme law.<sup>82</sup> From intimate awareness of the experiences of the game between 1914 and 1922, the Judge never enforced the reserve clause against the player for joining an independent league or club.<sup>83</sup> This step was taken by his successor, Commissioner Chandler.

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clusion was published after due investigation by Albert H. Walker in his letter of September 4, 1911 (reprinted 47 Cong. Rec. 4:3485 f) and through the later exhaustive research into the relevant congressional documents by M. H. Bumphrey, an expert and veteran parliamentarian (Thorelli, *The Federal Antitrust Policy*, 210-214 [London, Stockholm, Baltimore, 1954]). Foraker, *Notes of a Busy Life*, II, 160 *et seq.* See especially *ibid.*, 169-171, for the decisive comparison between the text of the Sherman Antitrust Act, 26 Stat. 209, and the previous drafts by Senator Sherman of his proposed legislation.

<sup>81</sup> Burton, *J.*, dissenting, 346 U. S., *supra*, 360.

<sup>81a</sup> *Curran v. Wallace*, 306 U. S. 1, 14.

<sup>81b</sup> H. R. Rep. No. 2002, 82d Cong. 1st Sessn. 58-59 (1952).

<sup>82</sup> *Ibid.*

<sup>83</sup> Johnson, *The Law of Sports: The Unique Performer's Contract and the Antitrust Laws*, II, *The Antitrust Bulletin*, 251, 259-262.

Under this interpretation of the right of reservation in contradiction to the testimony of the members of the National Commission in the *Federal Club* case, the reserve clause in binding the player to remain with his team relegates him to a species of property.<sup>84</sup> His future services are sold through the euphemism of the purchase by his new club of the assignment of his contract.<sup>85</sup> He may be kept from entry into the Major Leagues for a number of years despite his attainment of the ability to join teams in "fast company" by the intricacies of the sway that their clubs enjoy over "The Farms" in the National Association of Professional Baseball Clubs.<sup>86</sup> This empire over subsidiary clubs has been a profitable market for the disposal of players to Major League competitors less richly manned with talent than the owner of an entrenched farm system.<sup>87</sup> That system has also nullified the limit of 22 players for each Major League team; the limit, the ostensible existence of which, furnished an essential argument throughout the *Federal Club* case in respect to the reasonableness of the reserve clause.<sup>87a</sup> The right of reservation was submitted in that Record as an honorary obligation in contradistinction to a legal or equitable one.<sup>88</sup> The force of that submission is borne out by the reference of Justice Holmes to the players as "free persons."<sup>89</sup>

The clubs for over the past quarter of a century, however, have profited by the advantage of the discarded circumstances that led to this reference. They charge off from their income tax returns, without amortization in the year of acquisition, the full purchase price paid for the assignment of a player's contract. Since the mid-1930's the Internal Revenue Service has not questioned the decisions allowing this deduction. It resulted from the judicial acceptance of the contention on behalf of Baseball that the reserve clause exhausts

<sup>84</sup> *B. B. P. Fraternity, Inc. v. Boston Am. L. B. B. Club*, 166 App. Div. 484, 487 (1915), aff'd, on stipulation for judgment absolute, 221 N. Y. 704.

<sup>85</sup> *Ibid.*; H. R. Rep. No. 2002, *supra*, 146.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*, 65.

<sup>87a</sup> *Ibid.*, 152-159.

<sup>88</sup> Brief for Defendants-in-error, p. 23, *Federal Club v. National League*, *supra*, 259 U. S. 200.

<sup>89</sup> *Ibid.*, 209.

the season's contract.<sup>89a</sup> Nevertheless, the necessity for the player to remain with his club as a condition of participating in the organized game by acquiescing in the right of reservation is involuntary servitude in defiance of the 13th Amendment.<sup>90</sup> At common law he is property through the right of the clubs to assign his future services.<sup>91</sup> This power of assignment over the player is an added element of the involuntary servitude of the player.<sup>92</sup>

During the revolt of these performers under John Montgomery Ward and again in the Federal League War, the United States Courts veered away from these consequences and repelled the accusations that the uniform contract denoted slavery by construing the reserve clause as a contract to make a contract if the parties could agree.<sup>93</sup> In overriding this qualification, Organized Baseball has permitted its regulations that thereby infringe upon the 13th Amendment to enter into the crucially activated provinces of the commerce clause and of the 5th and 14th Amendments.

The clubs are receiving a progressively accelerated ratio of their annual income from broadcasts over radio and television within the exclusive jurisdiction of Congress over commerce.<sup>94</sup> Through muscle power, the players are supplying the source of that income obtained by their clubs from this comparatively new segment of the national domain. That is an extreme economic, sociological and constitutional anomaly. The American people a century ago were insistent upon abolishing slavery by force of arms, oblivious to the

<sup>89a</sup> *Helvering v. Kansas City American Ass'n Baseball Co.*, 75 F. 2d 600, 604 (8th Cir.—1935); *Commissioner v. Pittsburgh Athletic Company*, 72 F. 2d 883 (3rd Cir.—1934).

<sup>90</sup> *U. S. v. Petrillo*, 332 U. S. 1, 12-13 (1947); *Pollock v. Williams*, 322 U. S. 4, 17-18 (1944); *Labor Relations Board v. National Maritime Union*, 175 F. 2d 686, 692 (2 Cir.—1949), cert. den., 338 U. S. 954; *Arthur v. Oakes*, 63 F. 310, 317-318 (7 Cir.—1894); *American Base Ball & Athletic Exhibition Co. v. Harper*, 54 Cent. L. J. 449 (1902)—Circuit Court of St. Louis, Mo.

<sup>91</sup> Glenn, *Fraudulent Conveyances & Preferences* (Rev. Ed.), I, §139 (New York—1940).

<sup>92</sup> *Turner's Case*, 1 Abb. U. S. C. C. 84 (4th Cir.—1867); *In re Thompson*, 117 Mo. 83 (1893).

<sup>93</sup> *Metropolitan Exhibition Co. v. Ewing*, 42 F. 198, 24 Abb. N. C. 419 (C. C. S. D. N. Y.—1890); *Weegman v. Killifer*, 215 F. 289, 291 (6 Cir.—1915).

<sup>94</sup> *Lorain Journal v. U. S.*, 342 U. S. 143 (1951); *Fisher's Blend Station v. Tax Com'n*, 297 U. S. 650 (1936); *Radio Comm'n v. Nelson Bros. Co.*, 289 U. S. 266 (1933).

imminent creation thereby of an unwanted centralization. At that period, they fought to defeat the acquisition of wealth from the muscle power of property in slaves within the federal territories, although the institution of slavery could not possibly have survived the advent of unprecedented mechanical power.<sup>95</sup> Samuel Jones Tilden in a campaign letter explained this in October, 1860.<sup>96</sup>

Yet Organized Baseball is attempting to continue the exemption of its uniform contract from the Sherman Act when the United States wields pragmatically the authority over the air of a sovereign at International Law; and the authority to prohibit the slave trade was a settled attribute of sovereignty beyond its own territories upon the high seas before, or at the latest shortly after, the end of the Napoleonic Wars.<sup>97</sup> The interstate commerce clause, independently of the 13th Amendment, has long outrun the contrary dictum in *Groves v. Slaughter* and in the principles of its application upon analogy to police power. Judge Frank in *Gardella* noted the difficulty of reconciling the opinion in *Federal Club* with the decisions by the Supreme Court under the Mann Act,<sup>98</sup> and the recent opinion in *Radovich* has thrown further doubt upon the soundness of the *Federal Club* decision.<sup>99</sup>

The reasonableness of the reserve clause is therefore a shibboleth at law and in fact. In equity, under state law, it was unenforceable prior to the entry of the 14th Amendment within this judicial orbit,<sup>99a</sup> and as early as 1902 induced an anticipation of that entry.<sup>99b</sup> With the exception of Bob Feller, the star players in testifying before the Congressional Subcommittee as to the fairness of the right of reservation reflected nothing beyond their own ability to command adequate salaries and the frequently remarked judicial habit of mistaking the

<sup>95</sup> Malin, *The Nebraska Question, 1852-1854*, 411 (Ann Arbor—1954).

<sup>96</sup> Bigelow, *Life of Samuel J. Tilden*, I, 155 (New York—1885).

<sup>97</sup> U. S. CONST. ART. I §9, quoted *supra*, n. 35; *Le Louis*, 2 Dods. 210, 165 Eng. Rep. 1464 (1817).

<sup>98</sup> 172 F. 2d *supra*, 410 n 5c, citing *Caminetti v. U. S.*, 242 U. S. 470 (1917); *Mortensen v. U. S.*, 322 U. S. 369, 375 (1944); *City of Cleveland v. U. S.*, 329 U. S. 14, 19 (1946).

<sup>99</sup> 352 U. S., *supra*, 452.

<sup>99a</sup> Note.—Monopsony In Manpower: Organized Baseball Meets the Antitrust Laws, 62 Yale L. J. 576, 587-590 (1953).

<sup>99b</sup> *American Base Ball & Athletic Co. v. Harper*, 54 Cent. L. J., *supra*, 451 (1902); *Shelley v. Kraemer*, 334 U. S. 1 (1948); *Hurd v. Hodge*, 334 U. S. 24 (1948).

familiar for the necessary. No Major League club has endeavored with happy relations to carry disgruntled stars. The consistent failure of the reserve clause throughout the history of the game to equalize the strength of the clubs was portrayed by the observed drift of stellar performers to the larger cities<sup>100</sup> before the invention of the Farm System by Branch Rickey. Thereafter, under his successive administrations, that System, nurtured by the right of reservation, monopolized the pennants or the redoubtable runner up spots in the National League races for St. Louis and Brooklyn in turn; while George Weiss for The Yankees in imitation of the Rickey methods has dominated the American League since 1936.

Under these circumstances, the continued exemption from the antitrust statutes of the reserve clause in the uniform contract of the baseball player, is, in effect, an abnegation by Congress of the sovereignty of the United States in favor of Organized Baseball. This is a government within the governments that cover the hemisphere from the Equator to Hudson's Bay.<sup>101</sup> Abnegation for it subordinates the privileges and immunities of the American player and the foreigner, by parity of reason,<sup>102</sup> in his performance of personal services to the unconstitutional domination of a monopoly in contravention of Article IV. The player has further been deprived without due process as provided by the 5th Amendment of his right to earn the reasonable value of his services; contract rights that have been accorded to athletes similarly situated by *Radovich* and *International Boxing Club*. In *Lynch v. United States*,<sup>103a</sup> it was held:<sup>103</sup>

"Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States \* \* \*

\* \* \* \* \*

<sup>100</sup> *Federal Club v. National League*, *supra*, Record on Appeal, f. 367. Edward ("Ned") Hanlon had been manager of The Baltimore Orioles, long remembered pennant winners of the National League for 1894, '95 and '96, with their "The Big Four": McGraw, Jennings, Keeler and Kelley. Hanlon testified upon cross-examination (*ibid.*) "The players naturally follow the big cities as a rule."

<sup>101</sup> Monopsony In Manpower, op. cit.; 62 Yale L. J., *supra*, 606.

<sup>102</sup> Cf. *Truax v. Raich*, 239 U. S. 33, 39-40 (1915).

<sup>102a</sup> 292 U. S. 571 (1934).

<sup>103</sup> *Ibid.*, 579, 580.

"Contracts between individuals or corporations are impaired within the meaning of the Constitution whenever the right to enforce them by legal process is taken away or materially lessened."

If Congress persists in maintaining the exemption of the reserve clause from the Sherman Act, it has for all practical purposes in the teeth of the 13th and 14th Amendments permitted Organized Baseball in the public interest through the functional exercise of the sovereign authority of the United States within the commerce power to employ the services of the vast majority of its players under contract without just compensation.<sup>103a</sup> This is a *de facto* delegation by Congress to Organized Baseball<sup>103a</sup> of the power of eminent domain or of angary or of an analogue.<sup>103b</sup> As it invades the contractual rights of the players, whether express or implied, they are entitled to recover the reasonable value of their services in the Court of Claims against the United States.<sup>103c</sup>

In the absence of such indemnification, the just compensation clause of the 5th Amendment has also been set at naught.<sup>104</sup>

This indemnification is essential to save the constitutionality *pro tanto* of the Sherman Act, if the right of reservation in the uniform contract of the baseball player remains exempt.<sup>105</sup>

This construction would seem equally essential if the contracts of prize fighters or football players were further pronounced exempt. All performers of personal services in professional athletics would in that case be receiving less protection under the Constitution within

<sup>103a</sup> *Schechter v. U. S.*, 295 U. S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U. S. 388 (1935).

<sup>103b</sup> Mr. Justice Burton dissenting, with whom Mr. Justice Frankfurter, Mr. Justice Minton and Mr. Justice Harlan joined, in *U. S. v. Twin City Power Co.*, 350 U. S. 222, 239-241 (1956); *U. S. v. Felin & Co.*, 334 U. S. 624 (1948); *U. S. v. New River Collieries*, 262 U. S. 341 (1923); *Vogelstein & Co. v. U. S.*, 262 U. S. 337 (1923).

<sup>103c</sup> *Ibid.*; *Waxman v. Williamson*, 256 N. Y. 117, 121; *Street Foundations of Legal Liability*, vol. 3, pp. 183, 185 (Northport, Long Island, N. Y.—1906); cf. *Hanlon v. MacFadden Publications, Inc.*, 302 N. Y. 502, 512 (1951); *Hickam v. Hickam*, 46 Mo. App. 496 (1891); *Rickard v. Stanton*, 16 Wend. 25, 26-27 (1836); *Whipple v. Dow*, 2 Mass. 415 (1807).

<sup>104</sup> *Reid v. Covert*, 354 U. S. *supra*, 8, n. 10, citing *inter alia* *Turney v. U. S.*, 126 Ct. Cl. 202, 115 F. Supp. 457, 463.

<sup>105</sup> *U. S. v. Witkovich*, 353 U. S. 194 (1957).

the amplitude of the contemporary interpretation of the commerce power and the elasticity of the 14th Amendment, in particular, than the slave holder was endowed with in the Louisiana Territory, if not in the unorganized territories, prior to The War Between The States.

Upon considerations of policy, withdrawal of the protection of the antitrust statutes from either the boxers or the football players seems unwise. Further investigation by the Department of Justice may discover monopolies over non-championship fights and fighters. As for the National Football League, it had approximately 2000 players under reservation by its 16 clubs during 1956, although its published regulations set the ceiling for each team at 60. The Chicago Cardinals had 223 including Johnny Lattner, who was in temporary retirement as assistant coach to Terry Brennan at Notre Dame. The draft of college players by the National Football League restricting the selectee to one of its 16 clubs, if he chose to join professional Football, exemplifies the need for the universal retention of the Sherman Act over professional sports in order to safeguard the constitutional rights of the players.<sup>106</sup>

There is no analogy between the exemption of insurance and sports. The former has been regulated by comprehensive state legislation for many years.<sup>107</sup> On the contrary the futility of resort by the individual athlete to a state court for the maintenance of his rights was theatrically heralded by the fines imposed this spring upon the Yankee players for a night club brawl. Under the New York decisions, a fine or penalty or exaction of any kind cannot lawfully be imposed by a party in interest, even though provided for in advance of the occurrence of the alleged wrongdoing by formal contract.<sup>108</sup> A ball

<sup>106</sup> *Chicago Cardinals Football Club, Inc. v. Etcheverry* (U. S. D. C. D. N. Mex., June 26, 1956). Mr. Dan Parker, the gifted Sports Editor of The New York Daily Mirror, immediately thereafter devoted the whole of his syndicated column to a correct and felicitous report of this proceeding (The Daily Mirror, June 28, 1956). Mr. Parker's resume appears on page 40 of the Two Star Edition.

<sup>107</sup> *Hooperston Co. v. Cullen*, 318 U. S. 313 (1943); *German Alliance Ins. Co. v. Kansas*, 233 U. S. 389 (1914); *N. Y. Life Ins. Co. v. Deer Lodge County*, 231 U. S. 495 (1913); *Paul v. Virginia*, 75 U. S. (8 Wall.), 168 (1869).

<sup>108</sup> *Wilcox v. Royal Arcanum*, 210 N. Y. 370 (1914). For the recipient of a fine to sit in judgment has since been held a denial of due process under the 14th Amendment (*Tumey v. Ohio*, 273 U. S. 510 [1927]). The indefinite power to exact a penalty has added a further defect under due process (*U. S. v. Cohen Grocery Co.*, 255 U. S. 81, 92 [1921]; *People v. Grogan*, 260 N. Y. 138, 145 [1932]; cf. *Panama Refining Co. v. Ryan*, 293 U. S. *supra*, 431, 432).

player's average span of 63 years in the Majors should not be jeopardized or his more fortunate professional longevity endangered by a test case with himself as plaintiff regardless of the fact that the New York Court of Appeals through Judge Cardozo in a famous opinion<sup>108a</sup> approved the philosophy of Rudolf Von Ihering. This maintains that the individual owes a duty to society to resist oppression. The decision of Justice Bissell for the Supreme Court of New York in *American League Baseball Club of Chicago v. Chase*<sup>109</sup> that Organized Baseball was a common law monopoly never affected the operations of the game during the Federal League War when the opinion was handed down or afterward.

The sooner that Baseball reorganizes, however, under the antitrust laws the more secure will be its position. Many excellent players will not go into the game because of the uncertainties of reaching the Major Leagues under its existing contractual arrangements.<sup>109a</sup>

"Minor-league clubs, meanwhile, find it harder and harder to get young players in competition with the attractive pay and steady work offered by industry. Youngsters are less willing than in past years to go through the rigors and low pay of class C and D ball, and sign a contract that makes them the property of the team that owns that contract, in the hope that they will hit the jackpot of the major leagues."

The clubs on their part should be entitled to have the F.B.I. police all phases of the pastime to forestall the gamblers. A national gambling statute would avoid the constitutional difficulties of a disguised police measure,<sup>110</sup> if it were avowedly framed to secure unprejudiced access to the public by manufacturers whose products are advertised throughout the channels of commerce by means of radio and television.<sup>110a</sup> The American people will not readily forgive the

<sup>108a</sup> *Morningstar v. Lafayette Hotel Co.*, 211 N. Y. 465 (1914).

<sup>109</sup> 86 Misc. 441 (1914).

<sup>109a</sup> U. S. News & World Report, June 21, 1957, WHY BASEBALL IS IN TROUBLE, 101, p. 102.

<sup>110</sup> *Kahriger v. U. S.*, 345 U. S. 22 (1953); see also, *U. S. v. Calamari*, 354 U. S. 351 (1957).

<sup>110a</sup> *Reid v. Covert*, *Ibid.*, 1. Mr. Justice Frankfurter, in concurring, stated (43):

, "[T]his Court, applying appropriate methods of constitutional interpretation, has long held, and in a variety of situations, that in the exercise of a power

slightest lapse from integrity in Baseball. Finally, unless national jurisdiction over the game is asserted by Congress in the acknowledged interests of commercial products generally, a raid through a regional moral storm by local legislation against its advertisements of beer<sup>111</sup> is always feasible because of the partial repeal of the interstate commerce clause by the 21st Amendment.<sup>112</sup>

This is a source of potentially transient annoyance. It is noticed to emphasize the circumstance that Organized Baseball should not prolong its isolation from the law. It is too great a part of American social and economic life to do so, since it has become integrated with national advertising. That its expansion merely as a professional game had not kept pace with legal growth was clear before the close of the tenure of Judge Landis.<sup>113</sup> In its new industrial role the rate of speed of its expansion and that of the law will probably continue to increase. The welcome membership of Japanese players in The Majors, discounting the approach of the feasibility through jet planes of a Big League club in Tokyo, will compel the reversal of *Toolson*, if their rights are similarly at issue. Otherwise the contradiction will be glaring in The Orient that for Baseball the United States has omitted to enforce the Sherman Act in accordance with the kindred guaranties of personal liberty in the Constitution. At home, the conclusion will be plain that while the property rights of the slave owner under the Constitution had once been judicially read to command implementation by Act of Congress for the purpose of fulfilling treaty

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specifically granted to it, Congress may sweep in what may be necessary to make effective the explicitly worded power. See *Jacob Ruppert v. Caffey*, 251 U. S. 264, especially 289 *et seq.*; *Purity Extract Co. v. Lynch*, 226 U. S. 192, 201; *Railroad Commission v. Chicago, Burlington & Quincy R. Co.*, 257 U. S. 563, 588. This is the significance of the Necessary and Proper Clause, which is not to be considered so much a separate clause in Art. I, §8, as an integral part of each of the preceding 17 clauses."

<sup>111</sup> Mr. Justice Holmes, dissenting, in which Mr. Justice Brandeis joined, in *Tyson & Brother v. Banton*, 273 U. S. 418, 446 (1927); *Samuels v. McCurdy*, 267 U. S. 188 (1925); *Purity Extract Co. v. Lynch*, 226 U. S. 192 (1912); *Rippey v. Texas*, 193 U. S. 504 (1904).

<sup>112</sup> *Mahoney v. Triner Corp.*, 304 U. S. 401 (1938); *State Board of Equalization v. Young's Market Co.*, 299 U. S. 59, 62, 63 (1936).

<sup>113</sup> Johnson, The New York Factor and the Chandler Act, 10 Brooklyn L. R. 323, 347 (1941); Baseball Law, 73 U. S. L. Rev. 252 (1939).

obligations<sup>114</sup> the present rights of American and alien ball players as parties to modern contracts, that defy equitable principles and actually entail definitive burdens of involuntary servitude, are not accorded relief either by the moral sanctions of the Charter of The United Nations or through the ordinarily fertile processes of constitutional limitations. Baseball cannot afford to oppose the progressive protection cast by these interrelated areas of Jurisprudence over human rights.<sup>115</sup>

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<sup>114</sup> Book Review, 36 Am. Jour. of Int. L. 343 (1942) of *Treaties and Constitutional Law: Property Interference and Due Process of Law*, by Willard Bunce Cowles.

The reviewer states (*supra*):

"The author points out, by the way, the little known fact that Chief Justice Taney's decision in the Dred Scott case holding the Missouri Compromise Act unconstitutional was in part based on the fact that that statute was an invalid implementation of the Louisiana Purchase Treaty."

<sup>115</sup> *Sei Juji v. State of California*, 38 C. 2d 718 (1952).

## **THE BETTER BUSINESS BUREAUS AND THE FEDERAL TRADE COMMISSION**

by

**JOHN W. GWYNNE\***

The Federal Trade Commission and the Better Business Bureau seem to have started life together. Each, in its own way, owes its origin to a desire to protect free enterprise and the public against deception and unfair trade practices.

The general idea of Better Business Bureaus apparently developed from the Associated Advertising Clubs of the World. In the early years of this century, the Advertising Clubs became much concerned over the widespread use of deceptive or fraudulent advertising because it was undermining the confidence of the public in advertising as a whole. At one of its annual conventions, the Association launched a study of the problem. At the next year's convention, about 1913 or 1914, the Association organized a committee to consider steps for the elimination and prevention of fraudulent advertising. This committee was named the National Vigilance Committee. The slogan "Truth-in-Advertising" was adopted and publicized. This National Vigilance Committee directed its activities against fraudulent advertising of national character. Groups in local communities set up organizations to deal with the problem of deceptive or fraudulent advertising on the local level. These were called Better Business Bureaus. The first such Bureau, I am told, was the Better Business Bureau in Minneapolis, which was started in 1914. Today, we find operating Better Business Bureaus in many cities throughout the country.

The Federal Trade Commission Act, which created the Commission, was approved on September 26, 1914. Section 5 of that Act provided as follows:

"Unfair methods of competition in commerce are hereby declared unlawful."

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\* Chairman, Federal Trade Commission, the title is supplied by this publication and is based upon Chairman Gwynne's remarks before the Association of Better Business Bureaus at New Orleans, La., on April 9, 1957.

In *FTC v. Raladam Company* (1931), 283 U. S. 643, the Supreme Court held that:

"The word 'competition' imports the existence of present or potential competitors and the unfair methods must be such as injuriously affect or tend thus to affect the business of these competitors \* \* \*."

Thus, the emphasis was put upon the interests of competitors rather than that of the public in general. In 1938, the Wheeler-Lea Amendment added the term "deceptive acts or practices" to Section 5. This amendment made it clear that detriment to the consumer, as well as injury to a competitor, was within the ban of the law. This same amendment also strengthened the law, particularly the enforcement provisions, in the matter of food, drugs, devices or cosmetics. In 1950, the law was amended in regard to the advertising of oleomargarine, so that representing or suggesting, by virtually any means, that oleomargarine is a dairy product is misleading and is prohibited.

In addition to the Federal Trade Commission Act, Congress has passed specific statutes regulating the advertising, branding and labeling of wool, fur and flammable fabrics. So it will be seen that the law has developed from an instrument to protect one competitor from the unfair practices of another to a much more comprehensive and effective instrument to protect the public as well. In all cases, however, the presence of a public interest and interstate commerce must be shown as jurisdictional elements. In this latter respect, the activities of your organization are somewhat broader than those of the Federal Trade Commission.

In the 40 years marking the existence of the Commission and of the Better Business Bureaus, many things have happened. We have fought two world wars. Empires have fallen. Once proud nations have become second-rate powers. New alliances have been formed and old ones scrapped. Everywhere there is a stirring in the earth, as hitherto forgotten people clamor for their place in the sun.

Given this situation, it is not surprising that once well established principles have also come under attack. Human liberty and individual responsibility, once the cornerstones of our civilization, have been challenged. In some regions they no longer exist, while in still broader areas they have been greatly restricted.

In the world of trade and commerce, these ideas of human liberty and individual responsibility have found expression in a force long known as competition. That this force has made great contributions to the world is well established by history. This is indicated by the fact that progress has consistently been greater in those times when individual liberty had the maximum freedom from unreasonable governmental domination.

And yet, despite its contribution to human welfare, the institution of competition is also under attack throughout the world, and in many areas is fighting a rear-guard action against forces ranging from complete government ownership to milder programs of state planning and domination.

Whatever arguments may be made for or against either the paternalistic or individualistic society, it is sufficient to say that we are committed to the latter, not only by our laws, but by the traditions and spirit of our people.

That is not to say that liberty and competition should be entirely uncontrolled. In fact, very emphatically, the contrary. The very essence of human liberty for one individual requires that there must be sufficient restraint on it to permit others to enjoy the same privilege. In like manner, we have adopted laws regulating the manner in which the competitive battle may be waged. Our laws regulating wages and conditions of employment, dangerous products, etc., are in a sense, limitations on competition. The same may be said of our antitrust laws and other statutes directly regulating business. While these laws are not 100% effective, they have, in the main, been adopted for the purpose of preserving competition by protecting it against its own excesses. When we no longer believe in competition, or when we have lost the stamina to live under its somewhat rigorous requirements, we will no longer need a Sherman Act, a Clayton Act or a Federal Trade Commission Act. And let me add also, there would be no further need of a Better Business Bureau.

Compared to law enforcement procedures generally, the methods of the Federal Trade Commission are somewhat novel. It has no jail, no uniformed policemen. It cannot levy a fine for past wrongs, no matter how illegal. It can, however, either by agreement or after trial, condemn a certain practice as contrary to law and issue a cease and desist order against its continuance. For the violation of

such order, a money penalty may be imposed. This is all in accordance with the intention of the Congress in creating the Federal Trade Commission. It was well expressed by President Wilson in his message to Congress recommending the legislation in the following language:

"The antagonism between business and government is over. We are now about to give expression to the best business judgment of America, to what we know to be the business conscience and honor of the land. The Government and business men are ready to meet each other half way in a common effort to square business methods with both public opinion and the law."

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"And the business men of the country desire something more than that the menace of legal process in these matters be made explicit and intelligible. They desire the advice, the definite guidance and information which can be supplied by an administrative body, an interstate trade commission."

In other words, the work of the Commission is largely preventive. Whenever a person is departing from the path chartered by "the business conscience and honor of the land," the Commission seeks to return him to that path. To accomplish this, it is often necessary to take the legal steps provided in the law. In fact, in recent years, the Commission in almost every field has filed an increasing number of complaints. I believe it to be our duty to be prompt and vigorous in applying sanctions where that course is necessary. The conscientious citizen who observes the law must not be left at the mercy of those whose conscience does not seem to bother them. However, where the same result can be accomplished by cooperation and mutual understanding, that is the more economical and satisfactory course. We must bear in mind, too, that cooperation is a two-way street, binding on both the regulated and regulator.

In order to attain the maximum amount of mutual understanding and confidence between business and law enforcement, there are some things that we at the Federal Trade Commission should scrupulously observe.

(1) Trade regulation law is unusually complicated. Therefore every effort should be made, through written opinions or otherwise, to clarify our view of the law.

(2) We should strive, by actual observation and study, to understand the problems of business. Consultation in too narrow a circle tends to produce ivory tower decisions which have little relation to the realities of the market place.

(3) The policies which govern business are laid down by the legislative bodies elected by the people. The final interpretation of their laws is by the courts. It is our duty to scrupulously observe the directions of both of these groups. Thus only, can we meet on the common ground of the widest possible understanding and responsibility.

In the broad scope of the laws with which the Commission is concerned, I wish to single out one in which your organization has considerable interest, that is, in the field of advertising.

Here again, in the last 40 years, there has been a tremendous development, much of it in recent years. For example, revenue in the advertising industry has grown from \$1,700,000,000 in 1935 to over \$9,000,000,000 in 1956. It is predicted that the television revenue alone will be \$1,500,000,000 in 1957, a substantial increase over 1956.

The Commission has for many years reviewed radio and television scripts which have been submitted by the networks and the broadcasting stations on request. This has been in conjunction with the examination of advertising in newspapers, magazines and other periodicals. In recent months, the Commission has expanded this work to include the monitoring of radio and television advertising.

Whatever the medium used, false and deceptive advertising has a wide range. It often includes false representations as to the character or quality of a product, the business status of the advertiser or his relations with others, including the Government, scientific or charitable organizations, disparagement of a competitor, and many others.

There are several items here which deserve special mention. One is bait advertising, with which you are familiar. The complaints we have filed in this area involved, first, cases where, because of the

geographical situation, interstate commerce was present, or, second, cases in the District of Columbia where we have complete jurisdiction. In the 48 states, there are many instances of bait advertising which are purely local transactions over which the Commission has no jurisdiction. Incidentally, in all cases of apparent law violation where jurisdiction is lacking, we have a policy of referring the matter to the local authorities. In these situations, your organization has rendered a great service, both in cooperation with the local authorities and in educational programs calling the consumers' attention to the specific improper practices.

Another item has to do with comparative pricing. If a retailer has been regularly selling a product for \$5.00 and decides for some reason to sell it for \$4.00, that is a matter which he will obviously wish to call to the attention of the public. Unfortunately, that program often lends itself to abuse—abuses which the buyer often finds it difficult to discover. For example, the merchant may affix his lower price to articles which did not regularly sell for the higher price. Or he may substitute inferior products. There are many variations of the scheme, all untruthful, and skillfully designed to attract those who love bargains. As a matter of fact, who among us does not? I am inclined to think this type of deceptive advertising will influence a larger group than many other kinds of misrepresentation. That is somewhat borne out by the fact that false comparative pricing, at least in certain areas and involving certain products, has shown indications of increasing.

Of course, many of these misrepresentations are purely local and must be charged to the retailer. In many of such cases, interstate commerce is lacking and the Commission is without jurisdiction. Like the phony closing-out sale, it is a matter for the local people.

There are cases, however, where the manufacturer or the supplier either instigates or aids the final deception. Through false price lists or markings on the goods, he places in the hands of his retailer the means of misrepresentation. That is often more deceptive than the crude work often done by the individual retailer. In such cases, interstate commerce is often present and the Commission is able to take action.

I note the special interest that Better Business Bureaus are taking in that particular type of bad business practice. Because of your far-flung membership, you are in a position to render a great service

to local authorities, the Federal Trade Commission and the public generally.

In this discussion of certain illegal practices, I wish to digress a moment to reaffirm a conviction I have long held. That is, that the overwhelming majority of the people are law abiding and that the great share of business is conducted on an honest basis. I say that without hesitation, even though we at the Commission do see something of the seamy side of our economic life.

But it is also true that a very small percentage of our population are murderers or highway robbers. Nevertheless, that fact has not rendered the Ten Commandments obsolete. Nor does it justify a lessening of the vigilance of our police officers or our prosecuting attorneys. Nor does it call for any decrease in the activities in our homes, our schools, or our churches in teaching man to live in righteousness and peace with his neighbors.

Our whole program in the advertising field is based on an ancient principle—the importance of truth in the affairs of man. "Thou shalt not bear false witness against thy neighbor." This eloquent statement carved in the tablets of stone has become an important precept in our religious faith. The administering of the oath, backed up by laws against perjury, indicate the necessity of truth in our judicial process. In the world of business, we have long had laws concerning fraud, misrepresentation and breach of warranty. We have come a long way from the slogan of the early traders—*Caveat emptor*—let the buyer beware.

In fact, that changing attitude has been in part responsible for the remarkable growth and development of business and for the advancement of civilization. Truth begets confidence. Confidence begets activities and wider human relationships. While the millenium is still far distant, we have built up a certain amount of confidence—confidence in our institutions—confidence in our fellow man. When a man comes into our office, we do not immediately conclude his mission is one of murder, but rather that he wants to sell a policy of insurance. At night our home is practically unguarded, because we are confident our neighbor will not burn it down or carry away our possessions. Thus, we may go about our daily affairs, free of the distraction and fear which kept primitive man chained to his savagery.

If, overnight, by some subtle and wicked magic, that confidence could be destroyed, those daily affairs could no longer be pursued, civilization would totter and mankind would be headed back to the jungle.

This was well understood by many ambitious tyrants who desired to destroy a rival civilization. Genghis Khan was, no doubt, a capable military leader. Yet, before he invaded an enemy territory, he preceded it with a crafty campaign of propaganda—artful lies designed to destroy the confidence of the people in their leaders, in their allies and in themselves.

There are examples, too, of confidence built upon truth. One has to do with the success of the early Phoenician merchants. At that time, many governments did not issue and regulate money. Nevertheless, gold, because of its attributes, had come to be accepted generally as a medium of exchange. Whereupon the Phoenician merchants minted gold coins upon which they inscribed their names together with the gold content of the coins. There was no provision for redemption in goods. Nevertheless, the integrity of these merchants was such that the coins were generally accepted for what they purported to be. Thus, trade was greatly stimulated among an ancient people.

Advertising is a great force in the business world. Yet, of itself, it sells no goods. It is merely the door by which the merchants, with goods to sell, contact the consumer with money to buy. In the long run, the success of the merchant bears a direct relationship to the confidence that the public has in him and his goods. As one well-known businessman has said: "Integrity will compel the advertisement to tell the truth. Competition will make the telling of the truth exciting."

On the other hand, the consistent use of false and misleading advertising tends to destroy the confidence of the public in all advertising. The Better Business Bureau of Pittsburgh, Inc. has published the results of a survey made by it in connection with Duquesne University on the general subject of comparative price advertising. Results of the survey indicated some skepticism on the part of the public toward certain phases of comparative pricing, and that the degree thereof varied directly with the exaggerated nature of the claims.

It is a great privilege to attend your convention. The work you and other like-minded organizations are doing redounds to the success and glory of our nation. My own experience has been in the field of the law, both in writing it and enforcing it. That, too, is important. Nevertheless, I am convinced that the best regulation for any individual, any industry or any nation is that which comes from within. The thought I have in mind is well expressed in a statement carved in the stone above the entrance of the Law College of the State University of Iowa. That statement is: "He who keepeth the law, becometh master of the intent thereof."

# ANTITRUST NEWSLETTER

## Supreme Court (Box Score) October 1957 Term (pending as of October 17, 1957)

Dkt. 3—*Federal Trade Commission v. Standard Oil Co.* (Seventh Circuit), Petition filed September 28, 1956.

December 17, 1956, petition for certiorari was granted and motion for leave to file brief of National Congress of Petroleum Retailers, Inc., *et al.*, as *amici curiae* was granted.

Under Section 2(b) of the Robinson-Patman Act, a seller may defend against a charge of price discrimination by showing that his lower price was granted in "good faith" to meet the equally low price of a competitor. The question presented is whether the "good faith" defense can be used to justify a lower price regularly granted to certain large customers pursuant to a long established pricing policy maintained by the seller and by certain competitors.

Dkt. 51—*United States v. Procter & Gamble Co.* (U. S. District Court of New Jersey), Appeal filed December 3, 1956-February 25, 1957, further consideration of the question of jurisdiction is postponed to hearing on the merits.

The U. S. District Court for New Jersey dismissed a Government antitrust action when the Government failed to produce, for inspection and copying, the transcripts of testimony of witnesses who had appeared before a grand jury investigating possible violations of the antitrust laws. The very important question involved is whether the Government can be required to open up the grand jury transcript minutes which it uses in the preparation and prosecution of a civil antitrust case.

Dkt. 59—*Northern Pacific Railway Co. v. United States* (District Court of Washington, D. C.), Appeal filed December 21, 1956. Jurisdiction noted January 21, 1957.

This case presents a question of whether a railroad company is in violation of the Sherman Act when it requires a grantee or lessee of railroad land to route over its railroad commodities produced on such land, provided that neither a lower rate nor better service is available from a competing railroad line.

Dkt. 67—*Nashville Milk Co. v. Carnation Company* (Seventh Circuit), Petition filed January 19, 1957. Petition granted and transferred to Summary Calendar March 4, 1957.

The issues are whether Sec. 3 of the Robinson-Patman Act (15 U. S. C. Sec. 13-A) is one of the "anti-trust laws" as defined by Sec. 1 of the Clayton Act and whether a private action for treble damages and injunctive relief can be maintained for a violation of Sec. 3 of the Robinson-Patman Act.

Dkt. 68—*Bruce A. Mackey v. Sears Roebuck & Co.* (Seventh Circuit), January 22, 1957, Petition filed, and now awaiting action.

The issues are whether Sec. 3 of the Robinson-Patman Act (15 U. S. C. Sec. 13-A) is one of the "anti-trust laws" as defined by Sec. 1 of the Clayton Act and whether a private action for treble damages and injunctive relief can be maintained for a violation of Sec. 3 of the Robinson-Patman Act.

The case also presents the question of whether the Circuit Court was clearly erroneous in holding that a conspiracy in violation of Sec. 1 of the Sherman Act had been established by the evidence.

Dkt. 69—*Safeway Stores, Inc. v. Harry V. Vance, Trustee, etc.* (Tenth Circuit), January 22, 1957, Petition filed. March 4, 1957, Petition granted, case transferred to Summary Calendar, and assigned for argument immediately following No. 67.

Dkt. 77—*Moog Industries, Inc. v. Federal Trade Commission* (Eighth Circuit), February 4, 1957, Petition filed. March 25, 1957, Certiorari granted but limited to one precise question.

The precise question in issue before the Supreme Court is whether the Court of Appeals was correct in denying petitioner's Motion to Hold the Federal Trade Commission's Judgment and Order in abeyance until various competitors can be subjected to similar judgments and orders, since only two of the competitors have similarly been proceeded against by the FTC, and whether such denial is inequitable since the various competitors may still continue to offer

volume discounts as enjoined by the FTC Order thereby causing substantial loss of business to the petitioner. The case was transferred to the Summary Calendar March 25, 1957. See related cases, Dockets 110 and 225.

Dkt. 101—*E. Edelmann & Company v. Federal Trade Commission* (Seventh Circuit), April 10, 1957, Petition filed, and now awaiting action.

The question presented is whether the CA-7 unreasonably failed to stay execution of a Federal Trade Commission order against petitioner until petitioner's various competitors, who use similar forms of discount structures, can be subjected to similar judgment and orders.

Dkt. 110—*Federal Trade Commission v. C. E. Niehoff & Co.* (Seventh Circuit), April 23, 1957, Petition filed, and now awaiting action. June 3, 1957, Petition for Certiorari is granted and case transferred to Summary Calendar for argument. See related cases, Dockets 77 and 225.

Dkt. 114—*Nationwide Trailer Rental System, Inc. v. United States of America* (U. S. D. C., Kansas), May 3, 1957, Petition filed, and now awaiting action.

Dkt. 225—*C. E. Niehoff & Co. v. Federal Trade Commission* (Seventh Circuit), June 26, 1957, Petition filed, and now awaiting action. See related cases, Dockets 77 and 110.

Dkt. 229—*Federal Trade Commission v. Crafts* (Ninth Circuit), June 27, 1957, Petition filed. October 14, 1957, a *per curiam* opinion reversing the judgment of the Ninth Circuit Court of Appeals was granted.

By reversing the judgment of the Court of Appeals and reinstating the judgment of the District Court, the Supreme Court in effect decided that the FTC may properly subpoena the files of an insurance company within the Commission's statutory authority. In addition, the holding of the District Court that the subpoena was not too broad was reinstated.

Dkt. 238—*Krasnov v. United States* (U. S. D. C., E. Penna.), July 1, 1957, Appeal filed. October 14, 1957, judgment of the District Court was affirmed. See also Dockets 254 and 255.

This case represents a rather unusual proceeding, in that, at the District Court level the court determined on a motion for summary judgment that defendants were in violation of Sections 1 and 2 of the Sherman Act.

The court likewise granted relief designed to dissipate the effects of the conspiracy and monopolization. The Supreme Court affirmed the judgment of the District Court without hearing oral arguments upon motion to affirm made by the United States. Mr. Justice Harlan and Mr. Justice Whittaker dissented from the opinion, noting that the procedure should have been that probable jurisdiction should have been granted.

Dkt. 254—*Comfy Mfg. Co. v. United States* (U. S. D. C., E. Penna.), July 9, 1957, Appeal filed. October 14, 1957, judgment of the District Court was affirmed. See also Dockets 238 and 255.

Dkt. 255—*Oppenheimer v. United States* (U. S. D. C., E. Penna.), July 9, 1957, Appeal filed. October 14, 1957, judgment of the District Court was affirmed. See also Dockets 238 and 254.

Several cases which appeared in the last issue of the Antitrust Newsletter as pending in the Supreme Court for the 1956 Term have been disposed of. They are as follows:

Dkt. 962—*Tuttle, etc. v. Federal Trade Commission* (Second Circuit), May 2, 1957, Petition filed. Petition denied June 17, 1957.

Dkt. 985—*The Kansas City Star Company v. United States of America* (Eighth Circuit), May 10, 1957, Petition filed. Petition denied June 17, 1957.

Dkt. 986—*Emil A. Sees v. United States of America* (Eighth Circuit), May 10, 1957, Petition filed. Petition denied June 17, 1957.

Dkt. 1006—*Barclay Home Products, Inc., et al. v. Federal Trade Commission* (District of Columbia Circuit), May 15, 1957, Petition filed. Petition denied June 17, 1957.

### Department of Justice Activity

*U. S. v. Standard Oil Company of Indiana, et al.* (D. C. N. D. Ind., Oct. 8, 1957, indict.).

A Federal grand jury at South Bend, Indiana indicted 14 gasoline companies on retail price fixing charges. The indictment alleges that

the companies engaged in a combination and conspiracy to increase the retail prices of gasoline on May 1, 1957, at service stations in the cities of South Bend, Roseland and Mishawaka and the immediately surrounding territory in the State of Indiana. According to the indictment, the alleged combination and conspiracy has had the effect of increasing, fixing and controlling the prices of gasoline; suppressing price competition between the defendants, and restraining interstate trade in gasoline.

*U. S. v. National Audio-Visual Ass'n, Inc.* (D. C. N. D. Va., Oct. 10, 1957, consent decree).

The Department of Justice filed in the Federal Court in Alexandria, Virginia, a civil complaint charging the National Audio-Visual Association, Inc. (NAVA), of Virginia, and its president, with a violation of Section 1 of the Sherman Act. At the same time a consent judgment terminating the case was entered by the court. The Government's complaint charges that the defendants have engaged in a combination and conspiracy with dealer members of NAVA to allocate territories, stabilize prices and rentals, and exclude mail order houses from the audio-visual equipment field. Audio-visual equipment includes 16 millimeter motion picture projectors, slide and other still projectors, projection screens, tape recorders, and record and transcription players. The judgment entered today enjoins the defendants from fixing, establishing or stabilizing trade-in allowances, prices or rentals of any audio-visual equipment. It also enjoins the defendants from inducing any manufacturer to allocate territories and from inducing manufacturers to refrain from selling to any person, group or class of persons or to refrain from giving schools or any group or class of persons favorable terms of sale or rental for audio-visual equipment. Other provisions of the judgment are aimed at enjoining the defendants from advocating any particular form or type of bid specification for the sale, rental or servicing of any audio-visual equipment. Manufacturers of audio-visual equipment are limited by the terms of the judgment in their participation in certain of the activities of NAVA.

#### GOVERNMENT PROPOSAL IN duPONT CASE

Attorney General Herbert Brownell, Jr., announced that the United States today filed in the U. S. District Court in Chicago—

in accord with that court's prior instruction—the Government's proposed final judgment in *United States v. E. I. duPont de Nemours, et al.*

The proposed judgment's main provisions are:

(1) duPont's 63,000,000 shares of General Motors Company stock would be transferred to trustees. These trustees, in turn, would distribute pro rata—in equal installments over a 10-year period—duPont's GM stock to duPont common stockholders, other than the following duPont stockholders: Christiana Securities Corporation, Delaware Realty & Investment Company, and the stockholders of Delaware Realty. Thus, each duPont stockholder (other than those named above) would receive duPont's GM stock in the proportion that his duPont stockholding bears to the total amount of duPont common stock outstanding.

(2) In addition, the trustees would sell—at public or private sale—over the same 10-year period the proportionate share of duPont-held GM stock allocable to Christiana Securities, Delaware Realty and the stockholders of Delaware Realty. Common stockholders of duPont—other than Christiana Securities, Delaware Realty and the stockholders of Delaware Realty—would receive options to purchase such stock before the trustees offer it to outside buyers. If in the trustees' judgment reasonable market conditions do not prevail, however, the time for sale could be extended, with the court's approval.

(3) During the 10-year period within which duPont-held GM stock would be distributed to certain duPont stockholders, the trustees would be required to execute a proxy to each duPont stockholder entitled to distribution, authorizing such stockholders to vote the pro rata share of GM stock which they are scheduled to receive. Thus, duPont stockholders could, soon after the proposed judgment's entry, directly register their views by voting whatever GM stock they would receive.

(4) Other provisions of the proposed judgment would: (a) Bar duPont from influence over GM; (b) prohibit duPont and GM from having interlocking directorates or common officers; (c) enjoin contracts which require GM to buy any specific percentage of its requirements of any product from duPont; (d) prohibit duPont

and GM from granting to duPont any preferential rights to manufacture or sell any chemical discovery made by GM.

Commenting on the proposed judgment, Assistant Attorney General Victor R. Hansen, head of the Antitrust Division, stated: "it complies with the Supreme Court's decision and reflects our concern to avoid any undue impact on the market for General Motors or duPont stock." He added:

"On the one hand, the proposed judgment would effectively eliminate duPont's influence over GM stemming from its holding of GM stock. Declaring duPont's GM stockholding illegal, the Supreme Court concluded that the record 'plainly revealed' that 'duPont purposely employed its stock to pry open the General Motors market to entrench itself as the primary supplier of General Motors' requirements for automotive finishes and fabrics'; that the 'fire that was kindled in 1917 continues to smoulder'; that it 'burned briskly to forge the ties that bind the General Motors market to duPont'; and that 'if it has quieted down, it remains hot, and, from past performance, is likely at any time to blaze and make the fusion complete.'

"On the other hand, the long period over which distribution and sale is required should avoid undue impact on the market for both GM and duPont stock.

"Present stockholders of duPont would retain their equity interest in GM. This equity interest, however, the judgment would for the first time make direct: duPont stockholders would be able to register their views regarding GM management immediately—instead of having their GM stock voted for them by the duPont controlling group. Equally important, by receiving their dividends directly from GM, they will avoid the double taxation that presently stems from their dividends being passed through duPont. Moreover, by separating their equity in duPont and GM the judgment would give stockholders greater flexibility in managing their securities by permitting independent decision regarding buying and selling with respect to each. Finally, the proposed decree requires sale of 40 per cent of duPont's GM holdings, and stretches the sale out over a ten-year period and provides for flexibility in marketing should unfavorable market conditions prevail.

"By eliminating duPont control and influence over GM, the effectiveness of smaller GM stockholders' vote in influencing GM policy will be enhanced."

*U. S. v. Chemical Specialties, Inc., et al.* (D. C. S. D. N. Y. Nov. 1, 1957, complaint).

The Department of Justice filed in the federal court at New York City a civil antitrust suit charging Chemical Specialties, Inc. and Ogden Corporation, both of New York, American Steroids, Inc. of Puerto Rico, and Syntex, S. A. of Mexico with violations of Sections 1, 2, and 3 of the Sherman Antitrust Act and Section 73 of the Wilson Tariff Act: The complaint alleged that these defendants combined and conspired to restrain and to monopolize, attempted to monopolize, and monopolized the importation into and the sale and distribution within the United States and Puerto Rico of synthetic steroid hormones and intermediates. These hormones and intermediates are made from Barbasco root which grows wild and in abundance in Mexico. This Barbasco root and its derivatives are alleged to be economical, efficient and flexible starting materials in the production of synthetic hormones. The hormones are used by pharmaceutical companies to make various drugs, including cortisone, hydrocortisone, and prednisone, which are prescribed in the treatment of arthritis, cancer, Addison's disease, and other diseases.

The complaint alleges that the defendants prevented other manufacturers from obtaining a source of supply of Barbasco root and its derivatives; entered into restrictive agreements with other manufacturers to control the supply of hormones in this country; sought to coerce competitors to limit their production and to join in price fixing and customer allocation agreements; sold to competitor's customers at unusually low prices to deprive such competitors of business; imposed restraints on the use after sale of their products to customers to eliminate them as potential competitors; threatened and engaged in harassing patent litigation to maintain control over the industry; and acquired control of the industry through predatory practices. According to the complaint, Syntex, S. A. engages in the sale of hormones through its affiliated companies in the United States and Puerto Rico, and it controls the prices at which and the customers to whom these affiliates sell its products. The defendant Ogden Corporation owns and controls the stock of Syntex, S. A. and

its affiliates. The complaint seeks injunctive relief against the various practices alleged. The Court is also asked to grant relief with respect to defendants' patents in order to restore competition in this industry.

*U. S. v. Combustion Engineering, Inc.* (D. C. S. D. N. Y. Nov. 1, 1957, consent decree).

A civil antitrust suit was filed in the United States District Court at New York City charging Combustion Engineering, Inc., New York City, with violating Section 1 of the Sherman Antitrust Act in connection with the manufacture and sale of steam generating and fuel burning equipment. At the same time, a consent judgment was entered terminating the case. This equipment is widely used throughout the world for heating houses, offices, factories and other buildings, and for motive power in steamships and railroad locomotives. An important use of steam generating and fuel burning equipment is the generating of electricity such as is done by electric utility companies. According to the complaint, approximately 60 percent of Combustion Engineering's business is concerned with the manufacture of such equipment for electric utility companies. The complaint names as co-conspirators, but not as defendants, 12 foreign manufacturers, each of which is a leading producer of steam generating and fuel burning equipment in its respective country.

It is alleged that the defendant has contracted and conspired with these foreign manufacturers to allocate world markets among themselves for the manufacture and sale of such equipment. It is further alleged that exclusive manufacturing territories were assigned to the defendant and co-conspirators, and that restrictions on sales outside of those territories were imposed. The judgment entered today enjoins the defendant from enforcing those provisions of its present contracts with foreign companies which formed the basis for the allocation of world markets. In addition, the defendant is prohibited from entering into any future contracts with any foreign company (1) allocating or dividing territories or markets; (2) restricting or limiting imports into the United States; (3) requiring any foreign company to purchase equipment from any designated source or to use the equipment installation service of any other foreign company; (4) preventing a foreign company from buying or using equipment manufactured or sold by anyone other than the defendant; and (5) giving the defendant the continuing right to take title under

any patents relating to equipment and which are licensed by a foreign company to the defendant exclusively. The defendant is also enjoined from giving any foreign company any commission except for actual services rendered and from using any United States patent right acquired pursuant to a prior agreement from a foreign company, which holds an equipment patent license from the defendant and which is not controlled by a domestic competitor of the defendant, to prevent that company, itself, from importing into and selling in the United States to an ultimate consumer, equipment covered by such patent right.

*U. S. v. Lyman Gun Sight Corp., et al.* (D. C. D. C., Nov. 8, 1957, consent decree).

Attorney General William P. Rogers announced the entry in the Federal District Court in Washington, D. C., of a consent judgment successfully terminating a civil antitrust suit, filed on February 29, 1956, charging seven defendants with violating Section 1 of the Sherman Act in connection with the manufacture, distribution, sale and advertising of rifle scopes. Scopes are telescopic sights mounted on rifles for the purpose of aiming more accurately. The complaint charged that the defendants engaged in a combination to eliminate "off-list dealers," who do not adhere to the manufacturers' list prices, from the scope business. It was alleged that the defendants agreed to deny off-list dealers access both to supplies of scopes and to appropriate advertising media, and that the defendants acted in implementation of these agreements. The final consent judgment entered today enjoins the manufacturing defendants from any agreements to fix or maintain prices or to cut off off-list dealers from their sources of supply or from advertising media, or to limit them in these respects; from any individual conduct aimed at price fixing or interfering with off-list dealers' access to supply and advertising; from all fair trade agreements for a period of seven years; from certain publicity and advertising for a two-year period. In addition, any manufacturing defendant who engages in consumer advertising is ordered to sell scopes, on non-discriminatory terms, to off-list dealers. The defendants publishing outdoors magazines are subject to injunctions against agreements aimed at refusing advertisements of off-list dealers; and, for a period of 10 years, against individual conduct for the same purpose.

*U. S. v. Oregon Milk Distributors, et al.* (D. C. Oreg., Oct. 30, 1957, indict.).

A Federal Grand Jury in Portland, Oregon returned an indictment charging that Oregon Milk Distributors, seven of its distributor members and Safeway Stores, Inc., had conspired to fix milk prices in the Portland marketing area, consisting of Portland, Oregon and Vancouver, Washington.

Each of the defendants has its principal place of business in Portland, Oregon, except Arden Farms Co., which has its principal place of business in Los Angeles, California, and Safeway Stores, Inc. which has its principal place of business in Oakland, California. The indictment alleges that the named defendants and other persons who are engaged in the distribution of milk in the Portland marketing area have agreed to fix prices paid to producers for raw milk, to fix distributor prices for bottled milk and other fluid milk products, to establish non-competitive quantity discounts for bottled milk and to restrict and eliminate competition among distributors in the sale and distribution of bottled milk and other fluid milk products. The total sales by all distributors in the Portland marketing area are alleged to have amounted to more than 120,000,000 quarts of bottled milk and other fluid milk products during 1956. The defendants, according to the indictment, accounted for more than 80 percent of these sales.

*U. S. v. National Cranberry Association, et al.* (D. C. E. D. Mass., Oct. 29, 1957, consent decree).

The Attorney General announced that the Federal District Court in Boston, Mass., entered an antitrust consent judgment terminating the Government's antitrust case against the defendants.

The Government's complaint, which was filed on May 10, 1955, charged the defendants with violations of Sections 1 and 2 of the Sherman Act. The complaint charged the defendants with inducing and compelling independent cranberry growers, other cooperatives and independent shippers of cranberries to sell solely to the defendant Association and that the defendants agreed to limit the manufacture of cranberry products solely to the Association. In addition, the defendants were charged with eliminating competition from independent manufacturers and from other cooperatives in the manufacture and sale of cranberry products and with controlling and regulating

prices and terms of sale for cranberry products. The judgment enjoins the Association, for a period of five years, from entering into any contract for the marketing of cranberries for a term of more than one year unless such agreement shall be terminable by the other party thereto between June 1st and July 31st of any year. After the five-year period, the Association is enjoined from entering into any such contract for a term in excess of three years unless the agreement provides that the other party thereto may cancel by written notice delivered between June 1st and July 31st of the third year. In addition, the Association is enjoined from (1) having any person as an officer or director who is also engaged in competition with NCA in the marketing of cranberries or cranberry products; (2) entering into any agreement to allocate or divide markets for cranberries; (3) contracting for the processing of its cranberries by any other processor at a time when it has available capacity and could process such cranberries itself without incurring substantially greater expense; (4) granting a manufacturers' discount to anyone other than a manufacturer; (5) discriminating between members and non-members as to payments and discriminating among its members in the administration of any pooling of cranberries; (6) exchanging cranberries suitable for the fresh market for those suitable only for processing to prevent such cranberries from being acquired by a competitor; and (7) from entering into any agreement for the destruction of cranberries.

The Association is further enjoined from granting any rebate or discount unless the amount or mathematical formula for calculating the amount is disclosed at or before the time of purchase, and it is also enjoined from granting any bonus or allowance to any customer on the basis of business done prior to the period to which such bonus or allowance applies. In addition, the judgment enjoins these defendants, for a period of three years, from voting their stock in NCA except on certain enumerated matters.

### Notes

Assistant Attorney General Victor R. Hansen, stated that record fines had marked enforcement of the antitrust laws during the first six months of 1957. Judge Hansen, reporting on activities of the Antitrust Division which he heads, also disclosed that 38 new antitrust cases had been filed since January 1, 1957.

With reference to the higher fines, Judge Hansen reported:

"Instead of the previous \$5,000 maximum fine for Sherman Act violations, the courts are now authorized to fine defendants up to \$50,000. The recently increased maximum penalty was imposed for the first time in June this year. Safeway Stores, Inc. was fined \$50,000 on each of two counts charging combination and conspiracy to monopolize and attempt to monopolize. In addition, it was fined \$5,000 on a charge of selling goods below cost for the purpose of destroying competition or eliminating competitors. Safeway's president was fined \$35,000 on each of the first two charges and \$5,000 on the third. He was given, as well, a suspended jail sentence. A Safeway Division manager was also fined and given a suspended prison sentence. During the six-month period, higher than previous maximum fines were imposed in six cases. In *U. S. v. B. F. Goodrich Co., et al.*, six defendants were fined a total of \$145,000. Under the previous law, the total maximum penalty which could be imposed on all six defendants would have been \$30,000. As it was, three of the defendants were each fined \$30,000. The other three received fines of \$25,000, \$20,000 and \$10,000. A total of \$696,750.00 in fines were meted out during the first half of this year. Of the 38 antitrust cases filed, 17 were criminal actions and 21, civil. This is a significantly higher number of cases than have been filed in comparable six-month periods in past years (1956, 29; 1955, 35; 1954, 23; 1953, 20; 1952, 25). In addition, a criminal contempt action was brought charging destruction of documents which had been subpoenaed by a grand jury investigating antitrust violations. A major monopoly case charged the Greyhound Corporation with monopolizing and conspiring with General Motors and others to monopolize the operation of intercity buses. It was charged that Greyhound secured through General Motors preferential rights to purchase buses, tires and fuel, discriminatory financing terms and discriminatory prices. It was also alleged that Greyhound excluded competitors from bus terminals. A consent judgment, terminating the action was entered at the time of filing the complaint. It enjoins Greyhound from certain practices and directs it to take certain steps, in order that the effects of the monopolization and conspiracy can be dissipated and opportunity for free competition restored. Another action charged monopolization of the business of cleaning, straightening and glazing bread pans for commercial bakeries throughout the

country. A group of cases involving the television industry challenge alleged 'block-booking' practices by companies distributing feature motion pictures to television stations. It is charged that these companies required the stations to license pictures in groups, including a number of pictures which the stations did not wish to license or televise, in order to obtain any of the pictures. The Division seeks to require the defendants to offer licenses on a picture-by-picture basis. By far the greater number of cases filed charged such clear-cut offenses as price-fixing, territorial and customer allocation and boycotts. As an example of the impact of price-fixing on the buyer, it is alleged in one case that the effect of defendants' price agreement has been to raise \$100 per unit the cost to building contractors on dwelling houses of average size. Another case charges price-fixing and boycotting agreements by retail hardware and housewares dealers aimed at eliminating 'discount houses' in an area on Long Island, New York. Another charges West Coast importers of wire nails with conspiring with Japanese steel mills and others to restrict the number of West Coast importers, allocate sales territories among them and stabilize the prices of the nails. In all three instances companion civil cases were filed to enjoin continuance of the conspiracies. Two cases filed name labor unions as defendants. In both, it is alleged that the unions are engaged in restrictive practices which go beyond legitimate labor organization activities exempted from the antitrust laws. Three criminal cases charge agreements to allocate customers among manufacturers of automatic sprinkler devices used in buildings for fire protection. These cases charge conspiracies in three different regions of the country and involve some of the same defendants. Other cases allege price-fixing of such products as athletic equipment, bread, drugs, mirrors, plywood, toys, concrete pipe, and sewing machines. Several significant court decisions were rendered during this period. One of the most important was that of the Supreme Court holding that duPont's acquisition in 1917-1919 of 23 percent of the outstanding stock of General Motors violated the Clayton Act's anti-merger section. The court remanded the case to the district court for entry of an appropriate judgment. A court of appeals decision affirmed the conviction after jury trial of a newspaper publishing company and its advertising director. The company had been found guilty of attempting to monopolize and monopolizing dissemination of news and advertising and the advertising director had been found guilty

of attempting to monopolize dissemination of news and advertising. The Supreme Court refused to review the decision. A companion civil case seeking injunctive relief is still pending. A District Court opinion found that the International Boxing Club of New York, Inc., the International Boxing Club, Madison Square Garden Corporation, James D. Norris and Arthur M. Wirtz had combined and conspired in restraint of and to monopolize and had monopolized promotion of professional world championship boxing contests, including the sale of radio, television and motion picture rights thereto. In the six-month period, 31 cases (16 criminal, 15 civil) were closed. There were 102 cases pending at the close of the six-month period."

*U. S. v. Atlantic Refining Co., et al.* (D. C. D. C. Oct. 11, 1957, motions).

Four motions were filed in connection with the enforcement of the so-called "oil pipeline consent decree" which was entered in the District Court for the District of Columbia on December 23, 1941. That decree terminated a case filed by the Government against 53 common carrier pipeline companies and their 36 oil company shipper-owners charging violation of the Interstate Commerce Act and the Elkins Act by the giving and receiving of illegal dividends "under the guise of dividends and earnings." The decree limited the amount of dividends which could be paid by the pipeline companies to their shipper-owners. In the first motion, against Arapahoe Pipe Line Company, of Brush, Colorado, the Government charges a violation of the judgment in that the defendant has failed to deduct from the valuation of its common carrier property, before computing its shipper-owners' permissible dividend, the share of the valuation of the company's carrier property financed by or attributable to loans in the amount of \$26,000,000 from third parties. The second motion directed against Service Pipe Line Company, Tulsa, Oklahoma, and its shipper-owner Standard Oil Company (Indiana) of Chicago, Illinois, charges that Service has, in violation of the judgment, added to its valuation, on the basis of which it computed the shipper-owners' permissible dividend, the pro rata value of additions and betterments and deducted the pro rata value of depreciation and retirements occurring after the close of the next preceding year for which the report was made. The Government's third motion, directed to Tidal Pipe Line Company, Tulsa, Oklahoma and its shipper-owner Tide-

water Oil Company, San Francisco, California charges a violation of the judgment by Tidal crediting and paying to its shipper-owner dividends and sums of money totalling \$20,776.30 by computing the shipper-owner's permissible dividend on the basis of the valuation of the common carrier property owned or used for common carrier purposes instead of property owned and used as required by the judgment. The fourth motion against Texas Pipe Line Company of Houston, Texas charges defendant with incorrectly reporting allowable dividends to its shipper-owner on the basis of valuation of property used by the carrier but not owned by it.

*U. S. v. American Smelting and Refining Co., et al.* (D. C. S. D. N. Y., Oct. 11, 1957, consent decree).

The Department of Justice entered in the federal court for the Southern District of New York a consent judgment against one of the two defendants in the Government's antitrust suit involving the American Smelting and Refining Company and the St. Joseph Lead Company. The decree terminates the action as to the American Smelting and Refining Company, but the case remains pending as to the defendant St. Joseph Lead Company. The suit was filed on October 9, 1953 and charged that the defendants, the two largest lead producers in the United States, restrained, attempted to monopolize and monopolized interstate and foreign trade in the production and sale of primary lead. It was alleged that the defendants agreed to suppress competition by regulating production, exercising control over the refining and marketing of competitors' production, and joining with foreign producers to influence the movement of foreign lead into the United States. The consent judgment enjoins American Smelting and Refining Company from entering into any agreement with a competitor to fix the price of primary lead, and specifically enjoins that company from exchanging information or consulting with the St. Joseph Lead Company with respect to any future change in the price of primary lead to be made by either company. The judgment also prohibits American Smelting and Refining Company from entering into any agreement with a competitor to limit or restrict the production of primary lead in the United States, from entering into any cartel agreement to restrict United States imports or exports of primary lead, from acquiring any domestic lead smelter or refinery within a period of 10 years from the entry of the decree,

and after 10 years only with the permission of the Court, and from entering into any toll contract for smelting or refining primary lead which results in the cessation of operations of any primary lead smelter or refinery not owned by the American Smelting and Refining Company. In addition to the foregoing, the judgment restricts the amount of lead which the American Smelting and Refining Company may refine for the St. Joseph Lead Company, prohibits any restriction on the amount of primary lead the St. Joseph Lead Company may refine for itself, and provides that after seven years from the entry of the decree any continuation of the refining of lead by the American Smelting and Refining Company for the St. Joseph Lead Company must either be with the consent of the Department or the approval of the court.

*U. S. v. Maine Lobster Company, Inc., et al.* (D. C. E. D. Ma., Oct. 15, 1957, indict.).

A federal grand jury in Portland, Maine, returned two indictments charging a trade association, four companies, and four individuals with violating Section 1 of the Sherman Antitrust Act in the sale and distribution of live Maine lobsters. The first indictment charged that the defendants conspired to fix a minimum selling price for live Maine lobsters sold by lobstermen to lobster dealers; refrained from catching lobsters until that price was obtained; and induced all Maine lobstermen to adhere to this agreement.

The second indictment charged that the defendants conspired to fix a maximum price at which they would purchase live Maine lobsters from lobstermen; adhered to this established price; and induced other lobster dealers to join in the agreement. The indictments allege that during 1956 approximately 20,572,000 pounds of live Maine lobsters, valued at more than \$9,000,000, were purchased by lobster dealers in Maine. Of this amount, the members of the Maine Lobstermen's Association allegedly account for approximately 60 percent.

A civil antitrust suit was also filed against the Maine Lobstermen's Association, and its president, involving the same activities charged in the indictment. The suit asks that the Court enter injunctive relief designed to restore competitive conditions in this industry.

*William H. Cook Named Attorney-Adviser to FTC Chairman*

Appointment of William H. Cook, 37, of Carbondale, Ill., as attorney-adviser to the Chairman of the Federal Trade Commission was announced Oct. 22, 1957 by Chairman John W. Gwynne. Mr. Cook, who joined the Commission in April, 1954, served first as an investigator for the Washington, D. C., field office, then a year later was assigned to compliance work in the General Counsel's office. He has been particularly active in antimonopoly work. He succeeds Leslie S. Miller of Silver Spring, Md., veteran antimonopoly trial attorney, who has returned to this work.

**Federal Trade Commission Activities**

*FTC v. Brown and Williamson Tobacco Corp.* (FTC Dkt. #6908, Oct. 21, 1957, Complaint).

The Federal Trade Commission charged Brown & Williamson Tobacco Corp., Louisville, Ky., with discriminating among its customers in granting promotional allowances. A Commission complaint charges that the company, whose gross sales exceeded \$350 million in 1956, pays promotional allowances to some customers but does not offer or pay such allowances to other competing customers. When the company does pay allowances to some competing customers, the complaint alleges, such allowances are paid in varying amounts and are not offered or paid on a proportionally equal basis to all such customers. The law, Sec. 2(d) of the Robinson-Patman Amendment to the Clayton Act, requires that, if promotional allowances are given, they be made available to all competing customers on proportionally equal terms. The complaint also charges the company offers allowances to competing customers conditioned upon the use of advertising displays which can be used only by a restricted number of such customers. In addition, the complaint alleges, the company negotiates on an individual basis with those receiving allowances, resulting in proportionally unequal, different, and arbitrary terms.

*FTC v. American Packing Co., et al.* (FTC Dkts. #6904-6907 incl., Oct. 21, 1957, Complaints).

Attacking selling practices in the canned salmon industry, the Federal Trade Commission issued four complaints against four Seattle, Wash., packers alleging illegal brokerage payments were

made to some customers. The complaints charge the packers with granting large grocery chains discounts or allowances in lieu of brokerage in violation of Sec. 2(c) of the Clayton Act, as amended by the Robinson-Patman Act.

Named in the complaints are: American Packing Co. (6904), Farwest Fishermen, Inc. (6905), Queen Fisheries, Inc. (6906), and an affiliated group consisting of Alaska Transportation Co. (6907), Pelican Cold Storage Co., Coastal Glacier Sea Foods, Inc., Pelican Packing Co., and Pelican Sales Co.

The complaints allege, among other things, that on direct sales which do not involve brokers, these packers reduce the market price to these chains by 5%—the amount of the normal brokerage fee. In other transactions where sales are made through brokers, the complaints say the packers give these customers lower than market prices. As an example of this, the complaints cite the practice of giving a 2½% reduction when only one broker is used, either a primary or field broker, and taking the price differential out of the broker's commission. According to the complaints, the packers generally sell their canned salmon through both primary and field brokers. Primary brokers are the selling agents for the Seattle area while field brokers are those employed by the primaries to handle transactions in other market areas. A primary broker is usually paid 5% commission, except where a field broker is employed. In the latter instance, the complaints say, each receives a 2½% split.

#### *Charles M. Brown Retires*

Charles M. Brown, the last member of the original staff of the Federal Trade Commission, retired Oct. 31, 1957, after more than 47 years of continuous federal service. At a farewell ceremony at the Commission, he was given a distinguished service award for his years of "exemplary service" and for his "significant contribution" to the FTC's efforts to encourage voluntary compliance with the laws of fair business competition.

*FTC v. Virginia Excelsior Mills, et al.* (FTC Dkt. #6630, Nov. 6, 1957, Order).

The Federal Trade Commission ruled that 12 excelsior manufacturers in Northern Virginia have operated Virginia Excelsior Mills, Doswell, Va., as their medium in carrying out unlawful restraint of trade agreements which have completely destroyed competition

among them. In an opinion by Chairman John W. Gwynne, the Commission denied the manufacturers' appeal from an earlier initial decision by Hearing Examiner Abner E. Lipscomb and adopted the examiner's order prohibiting them from employing a common selling agent or enforcing restrictions designed to set prices and control the market. "The law," Chairman Gwynne said, "now seems well settled that, while in many activities, the planned common course of action of members of an industry will be subjected to the test of reasonableness, nevertheless, agreements to fix prices are unlawful *per se*. No showing of competitive abuses or evils which the price fixing plan is designed to remove may be set up as a defense."

Virginia Mills, the opinion said, was organized in 1938 by the manufacturers to aid their industry, which was threatened with ruin because of keen competition from other excelsior manufacturers, as well as producers of other products. Its board of directors and officers were chosen from the manufacturers. After its organization, the opinion continued, Virginia Mills separately contracted with these stockholder members, agreeing to sell their excelsior, fix prices and quotas, and make settlement on sales. The contract provided for standardized grades of excelsior and for assessment of \$500 for breach of contract. It also prohibited any member from increasing its production capacity except by interchange of machinery or consolidation with other stockholders. The members agreed to refer all inquiries for excelsior to Virginia Mills and not to quote prices without written consent. Although the contracts have not been renewed since 1954, Chairman Gwynne noted, "performance continued substantially as before."

*FTC v. Hamburg Bros., Inc.* (FTC Dkt. #6721, Oct. 9, 1957, Suit. dec.).

A Federal Trade Commission hearing examiner issued an order which would dismiss without prejudice charges that Hamburg Brothers, Inc., Pittsburgh, Pa., a wholesale distributor of RCA television receivers, has discriminated in price between its retail customers. The examiner, Joseph Callaway, dismissed the Commission's complaint, issued February 5, on grounds that the company's challenged pricing practices "were justified in all significant respects."

The complaint had alleged that the company has given some, but not all, of its customers lower prices ranging from approximately

\$2.00 to \$32 per television set, depending on the price of the set. This discrimination, the complaint said, may be to lessen substantially or prevent competition between favored and non-favored retailers who compete, in violation of Sec. 2(a) of the Robinson-Patman Amendment to the Clayton Act. According to the examiner, subsequent to issuance of the complaint, the company submitted cost justification data prepared by an independent accounting firm. The Commission's Division of Accounting, he continued, reviewed this data and found that respondent's pricing practices, challenged in the complaint, were justified in all significant respects.

*FTC v. Socony Mobil Oil Co., Inc.* (FTC Dkt. #6915, Oct. 23, 1957, Complaint).

Socony Mobil Oil Co., Inc., New York City, the nation's second largest integrated petroleum concern and its sixth largest industrial corporation, was charged by the Federal Trade Commission with illegally inducing customers to handle its petroleum products exclusively and to discontinue handling competitors' oil and grease. A Commission complaint alleges the benefits and services granted by Socony to automobile dealers and other wholesale and retail customers, who agree to handle its products exclusively, have the effect of hindering and lessening competition, in violation of Sec. 5 of the FTC Act. The effects of these agreements, the complaint charges, are (1) to restrain competitors unreasonably in disposing of their petroleum products, (2) to tend to give Socony a monopoly in selling oil and grease to auto dealers, and (3) to tend to create a monopoly in the purchase of lubrication equipment and facilities. The complaint cites these typical inducements which Socony offers—all conditioned on exclusive handling of its products: Expensive lubrication equipment and other facilities are loaned to various customers or sold on easy repayment terms, while others are granted gifts of cash, equipment, services, or facilities.

The company also sells equipment on credit, coupled with different quantity, gallonage, and other allowances, some of which, the complaint alleges, may be used to liquidate the purchase price. Other benefits offered by Socony include the construction, painting, furnishing of paint, paving of lots, and the installation and maintenance, without charge, of lubrication equipment. The cost of some benefits,

the complaint says, does not bear a reasonable relation to the profits to be made on the prospective customers' oil and grease business.

*FTC v. Food Mart, Inc., et al.* (FTC Dkt. #6910, Oct. 23, 1957, Complaint).

The Federal Trade Commission charged a large Southwest grocery chain and two concerns it controls with receiving brokerage on purchases of food products made for their own account, in violation of Section 2(c) of the Robinson-Patman Amendment to the Clayton Act. According to the complaint, Food Mart owns 497 of Del Norte's 500 shares of stock, and one share each is owned by Mr. Weed and Mr. Davis. All 25 shares of the Davis brokerage concern are held by the four men in varying amounts.

Many of Food Mart's purchases, the complaint says, are made through its subsidiary, Del Norte, which in turn bought the products through the chain's controlled intermediary, Davis Brokerage. Through their ownership of the latter firm, the complaint charges, the four officers and stockholders of Food Mart and Del Norte shared in the brokerage fees collected by Davis in these transactions. Thus, the complaint alleges, the parties illegally receive something of value in lieu of brokerage on purchases made for their own account. According to the complaint, Food Mart's sales for the 53-week period ending March 31, 1956, were about \$35 million. For the same period, Del Norte's sales to the chain were approximately \$784,000, and \$105,000 to others. During the year ending Sept. 30, 1956, the complaint says, Del Norte purchased through Davis Brokerage approximately \$508,869 in frozen foods.

*FTC v. Leaf, Inc.* (FTC Dkt. #6749, Sept. 26, 1957, consent decree).

The Federal Trade Commission approved a consent order prohibiting Leaf Brands, Inc., Chicago, Ill., from paying promotional allowances to customers except on a proportionally equal basis. The Commission adopted an initial decision by Hearing Examiner William L. Pack containing an order agreed to by the company and the Commission's Bureau of Litigation. The Commission's March 26 complaint had charged the company with giving Food Fair Stores, Inc., Philadelphia, Pa., special allowances for advertising. These payments, the complaint alleged, were not made available to com-

peting customers, as required by Sec. 2(d) of the Robinson-Patman Amendment to the Clayton Act.

The order requires that when Leaf Brands pays allowances to one customer, it must offer affirmatively, or otherwise make available, allowances to all competing customers. Two other charges in the complaint were dismissed. One was that the company violated Sec. 2(a) of the law by selling chewing gum and candies to some customers at discounts but not offering discounts to competing customers. The other charge was that occasionally customers purchasing for their own account buy directly from the company and receive brokerage, or compensation in lieu of brokerage, in violation of Sec. 2(c). The examiner said that these two charges probably could not be sustained.

*FTC v. The Procter and Gamble Co.* (FTC Dkt. #6901, Oct. 7, 1957, Complaint).

The Federal Trade Commission charged The Procter & Gamble Co., Cincinnati, Ohio, the country's leading producer of soap and detergent products, with illegally acquiring The Clorox Chemical Co., Oakland, Calif., maker of "Clorox," the nation's largest selling household liquid bleach. A Commission complaint alleges the acquisition, which occurred on or after August 1, may substantially lessen competition or tend to create a monopoly, in violation of the Anti-merger Law (Sec. 7 of the Clayton Act). According to the complaint, at the time of the acquisition Clorox was dominant in its product market, was operating profitably, and the product had firm public acceptance. In 1956 Clorox sold about 48% of all household liquid bleaches, and the number two producer sold about 16%. The remaining producers—approximately 40—accounted for the balance, with no single company enjoying over 5% of the market. The complaint notes that Clorox's share of the market had been constantly increasing while its competitors' share was steadily diminishing. The value of the trade name "Clorox" is demonstrated by P & G paying over \$30 million for assets valued at about \$15 million, the complaint continues, adding that the excess represents the value of this trade name and the good will of the Clorox Co. Other household liquid bleach producers, the complaint charges, may be unable to compete with P & G due to its market position, financial and economic strength, advertising ability and experience, and merchandising and

promotional ability and experience. Additional factors which the complaint alleges are to the competitive disadvantage of other producers are: P & G's "full line" of cleansing and laundry products, ability to command consumer acceptance of its products in order to obtain valuable grocery store shelf space, and ability to concentrate on one of its products, or on one selected section of the country, the full impact of its advertising, promotional, and merchandising experience and ability. Consumer acceptance for household products is required in order to obtain critically short and valuable shelf space in grocery stores, the complaint says. P & G has the ability to command this acceptance, the complaint continues, because of its extensive advertising. The company is the second largest advertiser of all products in the country, having spent about \$79 million in 1956 utilizing all media. The complaint cites these examples of the company's ability to use advertising and promotion to gain shelf space and sell its products. In 1953 P & G introduced a new toothpaste, "Gleem," and in 1956 another one, "Crest." "Gleem" had acquired 25% of the toothpaste market by 1955, and "Crest" an additional 13% in its first year of production. In 1956 the company introduced "Comet," a household cleanser, and within nine months this product had about 29% of the market. In the latter promotion, the complaint says, P & G gave away about 30,000,000 "Comet" samples costing an estimated \$3.3 million. These illustrations demonstrate the impact that P & G now can accomplish on the liquid bleach market, the complaint charges. By acquiring Clorox, the complaint alleges, P & G increased its ability to get difficult-to-obtain shelf space since it now has a complete line of cleansing and laundry products while competitive household liquid bleach producers do not.

According to the complaint, P & G has assets of approximately \$726 million, annual net income of about \$60 million, and annual net sales of approximately \$1.2 billion. In addition to being first in producing soap and detergent products, the company is a major producer in other fields. These include food products (Crisco, Big Top peanut butter), toilet goods (Drene, Prell, and Shasta shampoos, and Lilt and Pin-It home permanents), and paper products (Charmin toilet tissue, facial tissue, napkins, and towels). The company, the complaint continues, has completely-owned subsidiaries in Canada, England, Cuba, The Philippines, Indonesia, Mexico, Venezuela, and Belgium. P & G has grown tremendously in recent years, having

increased its net worth, sales, and profit over 300% since 1946. In addition to constantly diversifying its operations and making new products, the complaint says, the company also has entered into the production and sale of additional products through acquisition. The complaint cites these companies which P & G has acquired since 1955 in addition to Clorox: W. T. Young Foods, Inc., Prepared Mix Division of Nebraska Consolidated Mills, Inc., Hines-Park Foods, Inc., Duncan Hines Institute, Inc., and Charmin Paper Mills, Inc. The complaint adds that the company has aquired numerous soap and detergent companies since 1905.

*FTC v. Schick, Inc.* (FTC Dkt. #6892, Oct. 7, 1957, Complaint).

The Federal Trade Commission charged Schick, Inc., Lancaster, Penna., with discriminating among its customers in prices, promotional allowances, and demonstrator services in the sale of electric shavers. The company also is charged with illegally fixing wholesale and retail minimum prices for its shavers and with falsely claiming its "Lady Schick" is free with the purchase of a "Schick 25." Also named in the Commission's 4-count complaint is the company's wholly owned subsidiary, Schick Service, Inc., of the same address. According to the complaint, Schick sells direct from its factory to wholesalers and retailers, while the subsidiary sells to retailers and consumers through 65 service stores in the nation's largest cities. The first count of the complaint says Schick gives wholesalers' discounts to many retailers who misrepresent themselves as wholesalers. The complaint says this is accomplished in many cases by the use of "dummy or fictitious buying devices," such as controlled affiliates of large retail chains. These dummies represent themselves to Schick as doing a legitimate wholesale business when actually their only business is to buy at wholesale for their affiliated retail chains. The complaint cites these illustrations of Schick's discriminatory prices: During 1956 the company sold its electric shavers to direct retail customers at 49% and 50% discounts from list, and to competing indirect retail customers who bought through wholesalers at about 40% discount. Wholesalers were sold at list less 50%. Beginning in January 1957, retailers buying from the factory received approximately 48% off, while the indirect competitors were granted substantially less. The price to wholesalers was list less 48%. Schick, the complaint charges, further discriminated in price between retail

dealers who bought from the company's service stores at 35% to 40% from list and competing dealers who bought the same shavers direct from the factory at 49% and 50% discount.

These price discriminations, the complaint charges, violate Sec. 2(a) of the Robinson-Patman Amendment to the Clayton Act, and their effect may be substantially to lessen or destroy competition. The complaint's second count charges that Schick pays promotional allowances to some direct and indirect customers but not all. When Schick pays allowances, the complaint says, it does so in varying amounts and unequal percentages and does not make its largest allowances available to all competing customers. In addition, most allowances are determined by individual negotiations by or between Schick and its customers. These practices, the complaint charges, violate Sec. 2(d) of the amended Clayton Act, which requires that, if promotional allowances are given, they be made available to all competing customers on proportionally equal terms.

The complaint's third count alleges the company furnished favored retailers with demonstrators who gave free shaves, repaired Schick shavers brought to the store by customers, and gave these shavers a free cleaning. The complaint charges these demonstrator services were not made available to competitors on proportionally equal terms, as required by Sec. 2(e) of the Robinson-Patman Amendment to the Clayton Act. The final count in the complaint alleges violations of Sec. 5 of the FTC Act, which prohibits unfair acts and practices in commerce. Here it was charged that Schick illegally fixes and maintains resale prices. The minimum resale price agreements which the company enters into with many wholesalers and retailers are illegal, the complaint alleges, because these customers compete with Schick and its subsidiary.

The wholesaler's contract permits sales at wholesale only and forbids any to consumers, the complaint says, adding that Schick compels retailers, who have not entered into agreements, to observe the fixed prices. These agreements have a dangerous tendency to hinder competition unduly, the complaint charges. Finally, the complaint charges that Schick misrepresented its "Lady Schick" would be given free with the purchase of a "Schick 25," a man's shaver. The company used the slogan "BUY HIS—GET HER'S FREE" in newspapers, magazines, radio and TV commercials, and other promotional material. This "Lucky Lady Special Offer" ran from about January

14 until May 15, 1957. Prior to this so-called free offer, the complaint says, the fair trade price of the "Schick 25" was \$29.50 with a trade-in allowance of \$7.50 for an old shaver, reducing the net price to \$22. During the promotion the fair trade price remained the same, but trade-ins were not permitted on any "Schick 25" which contained a certificate entitling the purchaser to a "Lady Schick." The company also increased the price of its 25's to wholesalers, who in turn also increased their price to retailers. While Schick did not increase retailers' fixed fair trade prices, the complaint continues, the price increase caused retailers, where fair trade is not in force, to raise the price to the public. Shortly after this promotion and just prior to marketing its new model 25, Schick sharply reduced the wholesale, retail, and consumer prices of 25's then in stock. Thus, the "Lady Schick" was not free, the complaint charges, for these reasons: (1) Schick's refusal to accept trade-ins was in effect a price increase on the "Schick," and (2) the company's price jump to wholesalers required dealers to charge more for the "Schick 25" in places, including the District of Columbia, where fair trade is not in force and effect. This deceptive advertising, the complaint charges, has diverted trade unfairly from competitors.

*FTC v. North American Philips Co., Inc.* (FTC Dkt. #6900, Oct. 10, 1957, Complaint).

The Federal Trade Commission charged North American Philips Co., Inc., New York City, with discriminating among its customers in prices, promotional allowances, and demonstrator services in the sale of its Norelco electric shavers. The first count of a 3-count complaint alleges the company gives many large retail customers wholesalers' prices because of their large purchasing power. In many cases, the complaint continues, these retailers misrepresent themselves as wholesalers by the use of "dummy or fictitious buying devices," such as controlled affiliates of large retail chains. These retailers represent themselves to North American as doing a legitimate wholesale business when in reality their only business is to buy at wholesale for their affiliated retail chains, the complaint charges. Cited by the complaint were the following discriminatory prices: During 1956 the company sold its electric shavers to direct retail customers and wholesalers at 40% plus an additional 20% discount from list, and to competing indirect retail customers who bought

through wholesalers at discounts varying from 35% to 40%. In 1956, the complaint continues, Model SC 7759 was sold to direct retail customers for \$11.98, and to their indirect retail competitors at \$16.22 in purchases of one to five, and for \$14.97 in purchases of six or more.

These price discriminations, the complaint charges, violates Sec. 2(a) of the Robinson-Patman Amendment to the Clayton Act, and their effect may be substantially to lessen or destroy competition. The complaint's second count charges that North American pays promotional allowances to some direct and indirect customers but not to all. When the company pays allowances, the complaint says, it does so in discriminatory and disproportionate ways. For example, the complaint says, under the company's "Share the Cost" advertising agreement, a large Philadelphia chain store received more than half of all the local advertising money spent by North American for all its Philadelphia dealers and almost as much as it paid for the shavers. In other cases, the complaint says, North American gave prize money or free shavers to salesmen of favored wholesalers and dealers while not making similar offers to their competitors. These practices, the complaint charges, violate Sec. 2(d) of the amended Clayton Act which requires that, if promotional allowances are given, they be made available to all competing customers on proportionally equal terms.

The complaint's third count alleges the company furnished favored direct and indirect retail customers, with its salaried personnel as demonstrators and servicemen, to sell, repair, or demonstrate Norelco electric shavers in the retail stores. The complaint charges these demonstrator services were not made available to competitors on proportionally equal terms, as required by Sec. 2(e) of the Robinson-Patman Amendment to the Clayton Act. According to the complaint, the company's net sales in 1956 were almost \$29 million. It sells Norelco electric shavers throughout the United States, which it has divided into 17 sales territories. A manufacturer's representative is in charge of each territory. He is selected and appointed by the company and sells on a commission based on an annual sales quota, the complaint continues. Through these manufacturer's representatives, the complaint says, North American sells directly to 2,000 customers (wholesalers, large retail chain stores, and other large retailers) and

indirectly to many other customers who buy from the company's wholesale purchasers.

*FTC v. The Texas Co.* (FTC Dkt. #6898, Oct. 10, 1957, Complaint).

The Federal Trade Commission charged The Texas Co., New York City, with discriminating in prices among its lessee service station dealers and with illegally fixing the resale price of its "Texaco," "Fire Chief," and "Sky Chief" gasolines. A Commission complaint charges the company with selling gasoline to favored customers at prices lower than it charges their competitors, in violation of Sec. 2(a) of the Robinson-Patman Amendment to the Clayton Act. The company also is charged with combining illegally with the favored customers to fix their retail prices, in violation of Sec. 5 of the FTC Act.

The complaint alleges that since November, 1956, Texas has sold gasoline to some service stations in the Portsmouth-Norfolk-Virginia Beach, Va., area at prices substantially lower than those charged to competitors of these favored customers. The effect of this discrimination, the complaint continues, may be substantially to destroy competition between the favored and non-favored customers. According to the complaint, the company's policy is to grant temporary discounts to its dealers from regular tank wagon prices in certain areas, generally where there is a local price war or other price disturbance, conditioned upon the dealer's agreeing to post prices dictated by the company. Failure to do so, according to the complaint, is regarded by the company as sufficient basis not to allow such a discount, or to terminate it where already granted even though it is still being given to other dealers in the same competitive area. Texas entered into an unlawful combination and agreement with the favored service station dealers in the Portsmouth-Norfolk-Virginia Beach area to maintain and carry out this discount policy, the complaint says. Under the terms of the agreement, the complaint alleges, the company fixed the retail prices of gasoline sold at these service stations by its lessee dealers and the allowances, terms, and conditions of sale both to such dealers and to the public. This unlawful combination is singularly unfair and oppressive to the public, Texas' competitors, and dealers who do not receive the discounts, the complaint concludes, and it has a dangerous tendency to eliminate competition unduly.

between customers receiving the discount and their competitors who do not. The complaint says that Texas owns or leases 11,260,558 acres of land in the United States and has 13 refineries in nine states. In 1956 the company produced almost 150 million barrels of crude oil from its domestic wells, the complaint adds.

*Federal District Court Allowed Justice to Prosecute Merger Before Regulatory Agency.*

The Salt Lake City Federal Court ruled that the Department of Justice may proceed in an antimerger action to attempt to prohibit the combination of El Paso Natural Gas and Pacific Northwest Pipeline who had filed a merger application before the Federal Power Commission. FPC has not yet acted. Ordinarily, the Justice Department is forced to wait until after Commission action, and the courts have been extremely reluctant to overrule Commission decisions.

*Right of Manufacturer to Fix Resale Prices Without Benefit of Fair Trade Laws Upheld.*

Federal District Judge Edward A. Tamm told Parke, Davis & Co., one of the largest producers of drugs, that it could continue to refuse to sell to those retailers and wholesalers in Virginia and the District of Columbia—non-fair trade areas—who failed to comply with resale prices suggested by the manufacturer. Basis of Judge Tamm's ruling was a Supreme Court decision holding that any manufacturer may unilaterally choose its distributors so long as there is no agreement among them which tends to restrain trade. Parke, Davis maintained the absence of any agreement, stating that it simply ordered retailers not to cut prices if they wanted to handle the Parke, Davis line and also ordered its wholesalers not to sell to drug discount houses.

Testimony brought out that for one type of vitamin, Parke, Davis insisted that retailers, paying \$4.53 per 100 tablets, must sell them for \$9.67 compared with a discount house price of \$5.99.

**Increase of Industrial Concentration**

Industrial concentration was increased between 1947 and 1954, according to a statistical compilation released by the Antitrust Subcommittee of the Senate Judiciary Committee. The 1,756-page report, consisting almost entirely of tables, showed that the 50 biggest manufacturing corporations accounted for 23 percent of the value added

by manufacture in 1954 compared with 17 percent in 1949. In 22 industries, the four largest companies did 80 percent or more of their industry's business. The report further showed that the four largest concerns in 112 industries did more than 50 percent of the business while the four top companies in 314 industrial fields accounted for less than half of the business in those fields.

*One-Year Extension Voted for Small Business Administration by Senate Group.*

In a surprise action, the Senate Banking and Currency Committee voted to report out a bill providing for a simple one-year extension of the present Small Business Act with an increase in the business-loan revolving fund to meet loans approved by the SBA during the next twelve months. Last week, the House of Representatives passed a measure making the SBA permanent and giving it substantially increased powers. The Senate is expected to act on the bill as reported next week.

*Treasury Secretary Humphrey Unconcerned About Rising Business Failures and Mergers.*

Questioned sharply during a hearing of the Senate Finance Committee by Senator George A. Smathers, Secretary Humphrey dismissed the rapidly rising rate of small-business failures and the threat of increased economic concentration resulting from wholesale mergers as part of a "post-war adjustment." In reply to a statement by Senator Smathers that business failures had increased 89 percent since the end of 1952 and corporate mergers had climbed by about one-third since 1954, Mr. Humphrey replied: "The total number of businesses is not going down, they're going up. As long as that continues, I don't think we have anything to fear." In effect, the Treasury Secretary was saying that no harm is done to the economy when one industrial company with assets of \$5,000,000 fails or is forced to sell out to a larger concern if the business population is then increased by two new delicatessens.

Mr. Humphrey also stated that credit restraints "took hold" of small business first and that small business' share of defense contracts have not matched expectations.

*Two Decisions With Strong Small Business Implications Handed Down by the Supreme Court.*

1. On the fair trade front, General Electric lost the final round of a contest with a discount house when the Supreme Court refused to review a lower court ruling that the Masters Mail Order Company of Washington, D. C. has the right to sell appliances at discount prices by mail into the New York area. General Electric had contended that the Washington firm was subject to New York's fair trade statute on the ground that it was controlled by its parent, a New York discount organization.
2. In holding that the transportation of powdered and frozen foods is exempt from Federal regulation, the court handed a set-back to the Commerce Commission, 63 railroads and the American Trucking Association, Inc. The appellants argued that powdered and frozen foods are products of manufacture and therefore subject to regulation by the ICC. In agreeing with a lower court ruling in favor of a private trucker, the Supreme Court held that the products involved came under the agricultural exemptions of farm products.

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Sen. Joseph C. O'Mahoney is dissatisfied with the Justice Department's Antitrust investigation of jointly-owned crude oil and product pipelines. He feels that pipelines with single owners also indulge in purchaser prorationing and refusal to connect wells, and wants these lines investigated as well.

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Earl D. Johnson, Executive Vice President of General Dynamics Corporation, told an American Management Association conference that inflation, by forcing all business into a constantly increasing demand for cash, is one of the major reasons for today's many mergers. He said that larger companies were usually in a stronger position to meet the demand for cash, and that mergers provided for enlargement of facilities at a cost lower than that of new building. Mr. Johnson suggested the following as other reasons for mergers: diversification, leading to greater sales, higher profit margins and increased stability; relative disadvantage of the small company in current competition for scarce top administrative, scientific and engineering talent; increasing research expenses, requiring larger sales bases.

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The Justice Department has given an informal opinion to the National Automobile Dealers Association that plans for "territorial responsibility" for automobile dealers probably would violate the antitrust laws. The plans suggested various ways of financially rewarding dealers for sales within their own territories, and of penalizing dealers selling outside of their districts.

The Justice Department has stated that while the illegality of the suggested arrangements has not been definitely established in the courts, they would certainly move against these arrangements as antitrust violations.

The automobile dealers are reported as being increasingly interested in establishing some sort of territorial apportionment.

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The Supreme Court affirmed a U. S. District Court's finding that Nationwide Trailer Rental System, Inc. was guilty of illegally fixing prices and dividing territories among its members. The court prohibited Nationwide from suggesting rate schedules and setting up "exclusive territories" for its members.

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The United States Supreme Court ruled in cases involving Hudson Motor Car Company, now merged into the American Motors Corporation, and Packard Motor Car Company, now part of the Studebaker-Packard Corporation, that an automobile manufacturer can legally refuse to renew dealers' franchises in order to give one dealer an exclusive franchise.

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Sylvester Petro, in his article "Do Antitrust Laws Preserve Competition?", *The Freeman*, October 1957, argues that, instead of leading to the promotion and maintenance of competition, the antitrust laws are being used to discourage abler firms from operating to the limit of their abilities, and to handicap the larger, more efficient, merchandisers. He concludes that "the so-called antitrust laws are in fact anticompetitive and antisocial."

Mr. Petro feels that one very useful phase of antitrust policy is that concerned with secondary boycotts and "other predatory oppressive practices which I consider harmful interferences with the free market."

He feels that the common laws affords all legal action necessary for the preservation of competition in the United States. He would, in order to further competition, abolish the progressive income tax, and repeal laws granting privileges and exemptions to labor unions and special interest groups.

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The Justice Department announced on August 19 that record fines had marked antitrust law enforcement in 1957, and that 38 new antitrust cases had been filed since January 1957.

The Supreme Court refused to review a lower court ruling that Masters Mail Order Company of Washington, D. C. is not subject to New York's fair trade law even though controlled by a New York Corporation, and can sell appliances by mail at discounts. The suit had been brought by General Electric.

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The Federal Trade Commission has filed a complaint stating that the Procter & Gamble acquisition of Clorox is a violation of anti-merger statutes. The FTC alleged that the purchase would weaken competition in the production and sale of household liquid bleaches.

### Books

Adams and Hendry, *Trucking Mergers, Concentration, and Small Business: An Analysis of Interstate Commerce Commission Policy, 1950-6*, Report of the Select Committee on Small Business, U. S. Senate (G. P. O., June, 1957).

*The International Patent System and Foreign Policy*, Study of the Subcommittee on Patents, Trademarks and Copyrights, Committee on the Judiciary, U. S. Senate (G. P. O., 1957).

*Patents and Non-Profit Research*, Study of the Subcommittee on Patents, Trademarks, and Copyrights, Committee on the Judiciary, U. S. Senate (G. P. O., 1957).

### Book Review

Fuchs, Victor R., *THE ECONOMICS OF THE FUR INDUSTRY*, Columbia University Press, New York (1957), Pp. 168, \$5.00.

The follower of antitrust will find this study presented as a case of an industry whose growth has been retarded because it is so com-

petitive. Professor Fuchs' study includes a wealth of statistical data and much informative detail.

A fur pelt passes through several possible different hands: trapper or fur farmer, county collector, auction company, broker, dresser and dyer, dealer, manufacturer, jobber, and retailer. The industry consists of "thousands of small, fiercely competitive businessmen," and price competition predominates. Yet increasing the scale of operations does not appear as a ready solution to the industry's problems. Fur manufacturing, for example, is still a hand craft dependent on the skill of the individual workers, with a firm of twenty-five to fifty workers apparently being the most efficient.

Within this structure, short-run fluctuations provide instability. These minor movements of expansion or contraction usually last three to four months. They are neither random nor seasonal, and reflect subtle changes in consumer expectations about income and prices. The character of the decision making process is described as being highly emotional. Speculation, based on intuition, is a dominant element, and waves of optimism and pessimism "sweep through the fur market."

The demand for furs has not kept pace with the growing economy. The physical volume of furs sold has either remained constant or actually declined. A principal explanation lies in basic changes which have taken place in the economy. Shifts in the distribution of income have been away from the top income groups, and fur has never been an item of mass consumption. The growth of population has been greater in the warmer parts of the country. The move to the suburbs, with its demands for home ownership, power lawn mowers, etc., has adversely affected fur sales. Indeed, the ideology of the suburbs may be one of *inconspicuous* consumption. The highly competitive structure of the industry helps account for the industry's failure to adapt to changing conditions. Technology in manufacturing is stagnant through a lack of research. Retail advertising stresses comparative cost, e.g., "30 per cent below competitors," or "below wholesale cost." Such advertising and sharp practices injure the industry in the long-run.

Some forms of cooperation or collusion are recommended as necessary to revive the industry. Those branches of the industry which have been able to curtail competition to some degree, the fur farmers (through cooperatives), the auction companies (few firms), and skin

processors (a few large firms and closely guarded secrets of dyeing formulas and processes) have contributed the most innovation, product development, advertising, and lobbying.

Any collective action which touches upon prices, such as efforts to standardize the terms of sale and discounts, would, and has, run afoul of the antitrust laws even though, as Fuchs states, the structure of the industry makes price-fixing impossible. He recommends a levy at the point of skin processing, through which every fur skin must pass and at which point there are relatively few firms. This would provide a fund to finance a program of advertising to widen the market, encourage better merchandising methods, develop new processes and products, improve public relations and lobbying, and aid towards labor reforms. This, it is suggested, is the best that could be achieved in the face of government policy which does not press for rigorous price competition in all industries.

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## BIBLIOGRAPHIA

Mund, V. A., *The Right to Buy—and Its Denial to Small Business.*

Report prepared for Senate Select Committee on Small Business,  
85th Cong., 1st Sess. (Washington: Supt. Docs., 1957. Pp. 118.)

*Antitrust Problems in the Exploitation of Patents.* A Staff Report to  
Subcommittee No. 5 of the House Committee on the Judiciary,  
85th Cong., 1st Sess., Oct. 15, 1956. (Washington: Supt. Docs.,  
1957. Pp. 25.)

*Antitrust and Monopoly.* Report of the Subcommittee on Antitrust  
and Monopoly of the Senate Committee on the Judiciary, 85th  
Cong., 1st Sess. (Washington: Supt. Docs., 1957. Pp. 22.)

*Congress and the Monopoly Problem—Fifty-six Years of Antitrust  
Development, 1900–1956.* Report prepared by Legislative Refer-  
ence Service, Library of Congress, for House Select Committee  
on Small Business, 84th Cong., 2nd Sess. (Washington: Supt.  
Docs., 1956. Pp. 662.)

*Corporate Mergers and Acquisitions.* Staff Study of Subcommittee on  
Antitrust and Monopoly of Senate Committee on the Judiciary,  
85th Cong., 1st Sess. (Washington: Supt. Docs., 1957. Pp. 74.)

*Monopoly Problems in Regulated Industries.* Hearings before Anti-  
trust Subcommittee of House Committee on the Judiciary, 84th  
Cong., 2nd Sess., June–Sept., 1956. Pt. 2, vol. 4, Television.  
(Washington: Supt. Docs., 1957. Pp. 822.)

*Premerger Notification.* Hearings before Antitrust Subcommittee,  
House Committee on the Judiciary, 85th Cong., 1st Sess. (Wash-  
ington: Supt. Docs., 1957. Pp. 448.)

*A Study of the Antitrust Laws.* Hearings before the Subcommittee on  
Antitrust and Monopoly of the Senate Committee on the Judiciary,  
84th Cong., 1st Sess., Pt. 9, Appendix to Northwest Power.  
(Washington: Supt. Docs., 1956. Pp. 117.)

*Twenty Years of Robinson-Patman Act—Literature, 1936–56.* Spec.  
Ref. List No. 4. (Washington: Federal Trade Commission  
Library, 1956. Pp. 79.)

*Patents, Trademarks, and Copyrights.* Report of the Subcommittee  
on Patents, Trademarks, and Copyrights of the Senate Com-  
mittee on the Judiciary, 85th Cong., 1st Sess. (Washington:  
Supt. Docs., 1957. Pp. 31.)

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